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United States
COURT OF APPEALS
for the Ninth Circuit

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R.
McKELVY and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLANT SCHAEFER

Upon Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

MAR - 3 1952

PAUL B. O'BRIEN

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Upon Appeal from the United States District Court,
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Northern Division.

JURISDICTION

This is an action by appellant herein against appellees herein alleging damages to appellant by reason of a conspiracy among appellees to damage appellant.

The action was instituted in the United States District Court for the Western District of Washington at Seattle, Washington, and as alleged in appellant's Second Amended Complaint (page 367 of printed Transcript of Record) trial court jurisdiction is based on diversity of citizenship and amount in controversy under Title 28, United States Code, Sec. 1332.

Appellate Court jurisdiction is based upon usual appellate jurisdiction of this court from final orders and judgments in actions at law or suits in equity. Final order dismissing appellant's Second Amended Complaint was entered in the trial court on August 7, 1951 (page 532 of Transcript of Record), and notice of appeal therefrom was filed on September 4, 1951, was designated in Appellant's Designation of Contents of Record on Appeal (pp. 537-538, Transcript of Record), item 21, as one of the documents to be included in the record on appeal and was Certified by Clerk of the trial Court (pages 645 and 652, Transcript of Record) under item No. 82 as part of the record transmitted to the Appellate Court, but through a printing error was not included in the printed copies of Transcript of Record in this Appeal.

STATEMENT OF THE CASE

The sole questions involved in this appeal are:

1. Does the complaint, as amended, state a cause of action?

2. If so, is the action barred by reason of the statute of limitations?

3. Should the Court have granted plaintiff's motion (page 516, Transcript of Record) to file a Supplemental Complaint.

These first two questions are raised in the pleadings in the following manner: The complaint was filed and motions were directed against the complaint on the above points by the several defendants, each appearing separately. At the hearing on these motions, which were consolidated for hearing at one time, appellant herein requested and was granted permission to file an amended complaint.

To the amended complaint similar motions were directed, and the trial judge granted the motions, with leave to appellant herein to file a second amended complaint.

This was done (page 367 of record on appeal) and again similar motions were filed (pages 499 to 503 inc., of Transcript of Record) and the trial judge again signed an order dismissing the second amended complaint (page 532 of Transcript of Record) on the above grounds, but without leave to file a further amended pleading. These orders were therefore a final determination by the trial court and this appeal is taken to determine the propriety of such orders dismissing the second amended complaint.

The third question arose as follows: Shortly prior to the hearings on August 6 and 7, 1951 on the several

Motions to Dismiss directed to the Second Amended Complaint, plaintiff below discovered some strong evidence as to the further involvement of defendant McKelvy with the other defendants. Plaintiff then prepared and filed on 8/6/51 his motion for an Order permitting him to supplement his complaint by adding appropriate allegations as to said defendant McKelvy. Plaintiff also sought permission to supplement the complaint by adding allegations, adding one, B. J. Rask, as a party defendant and alleging certain threats and coercion practiced by him.

At the said hearing on 8/6/51 it was stipulated by all parties that despite lack of proper verification and supporting affidavits the facts set forth in said Motion by plaintiff might be considered by the Court in passing on defendant's Motions for Dismissal.

The Order of Dismissal (page 532, Transcript of Record) recites this stipulation, but the Court, having first found that the Motions to Dismiss should be granted, then cleared the record by denying plaintiff's Motion to file Supplemental Complaint. Should the appellate court reverse the trial court, then the Motion to File Supplemental Complaint should also be granted.

SPECIFICATION OF ERRORS

The District Court erred:

1. In granting the motions of the several defendants who appeared, to dismiss the complaint as amended on

the grounds that it failed to state a cause of action and that the statute of limitations had run, in that it does state a sufficient cause of action and the statute had not run.

2. In denying plaintiff's Motion for Order Permitting Filing of Supplemental Complaint.

ARGUMENT

1. *Summary of Argument.* Appellant's principal contentions may be briefly summarized as follows:

a. The second amended complaint does allege a cause of action for damages by reason of overt acts of the defendants pursuant to a preconceived concerted plan to damage plaintiff and appellant, all as more fully set forth in the Argument.

b. The statute of limitations begins to run from the last overt act; and these last acts were within the statutory period, hence the statute does not run for this action.

c. The material set forth in the Motion for Order Permitting Filing of Supplemental Complaint, having been stipulated as admissible, the motion should be granted if there is a reversal of the trial court's ruling.

2. *Conspiracy—Allegations to Sustain Same.* As a practical matter, little argument is required on the question of whether or not a cause of action is stated. Careful reading of the complaint, in the light of the rules of construction laid down in *Jefferson Hotel vs. Jefferson*

Standard Life Insurance Co., 7 F.R.D. 722; *Terteling vs. P.U.D.*, 8 F.R.D. 210; *Kansas Gas vs. Hastings*, 10 F.R.D. 280, should suffice. In addition, however, appellant cites the further law as follows:

“Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself. . . . The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable. The combination must be shown, however, if, because of a dishonest combination to accomplish some wrongful act the conduct complained of becomes actionable. The essential elements of a criminal or ‘civil’ conspiracy are the same, except that to sustain a civil action for conspiracy special damages must be proved.” (11 Am. Jur., Conspiracy, Sec. 45, pages 577 and 578.)

To the same effect see also: *Calcut vs. Gerig* (CCA 6th), 271 F. 220, 27 A.L.R. 543.

It is not necessary in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them or that they met during the process of the concoction of the scheme. (11 Am. Jur., Conspiracy, Sec. 48.)

In *Lyle vs. Haskins*, 168 P. 2d 797, the Supreme Court of the State of Washington held that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required and that direct and positive allegation and proof is not required.

Attention is also respectfully drawn to the many authorities cited in Vol 3, A.L.R., Permanent Index covering Volumes 1-175, Conspiracy, Sec. 1, pages 75 and 76.

Looking now at the Second Amended Complaint:

Appellant herein alleged in Par. VI (page 370, Transcript of Record):

“That defendants and each of them willfully, maliciously and with deliberate intent to injure, damage and defraud plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part of the following:”

Then followed a series of sub-paragraphs in which plaintiff below alleged the principal acts committed by defendants below in furtherance of said conspiracy, which, for convenience, are briefly summarized, but can be read in full beginning at page 370 of the Transcript of Record.

A. That the defendants Macri intentionally delayed performance and performed in a faulty manner their obligations under the contract between plaintiff and said defendants Macri, all for the purpose of and in fact

causing plaintiff greatly increased cost and unnecessary delay and that the acts of said Macris were joined in by the defendants Philp and Goerig who were silent partners of defendants Macri (but this latter fact was not then known to plaintiff).

B. That on or about July 15, 1944, defendants Macri and defendants Philp and Goerig entered into a fictitious agreement purportedly terminating their joint venture, for the sole purpose of confusing the facts and attempting to deprive plaintiff of a cause of suit against defendants Philp and Goerig.

C. and D. That on or about November 1, 1944, defendant McKelvy became a co-conspirator with the other defendants in that said McKelvy accepted employment by plaintiff below to terminate the contract between plaintiff and said Macris and sue for the reasonable value of the work done, but in fact said McKelvy, after learning all facts about plaintiff below, worked closely with the other defendants (who, unknown to plaintiff, were clients of said McKelvy) and by every possible device (the details of which are set forth) attempted to accomplish the aforesaid ends of said conspiracy and almost succeeded.

F. and G. That just before suit was filed as alleged in sub-paragraph E, defendants caused a suit to be filed in Multnomah County, Oregon, against plaintiff for the sole purpose of tying up his credit and making it financially impossible to prosecute the proposed suit, which did dry up plaintiff's credit, and only by the grace of God and the extreme tenacity of plaintiff was he able

to prosecute his first suit against the Macris and the Continental Casualty Company.

H. Paragraph H goes into great detail to show that the defendants in said first suit abused the judicial processes for the purpose of furtherance of said conspiracy to bankrupt plaintiff and ruin his reputation and credit.

I. Shows how the defendants by crafty language on the draft in settlement of the judgment plaintiff obtained in his first suit attempted to block filing of this suit.

J. Shows how defendant McKelvy attempted to get plaintiff to pay McKelvy a fee for alleged services rendered by McKelvy to plaintiff for the purpose of precluding plaintiff from filing this action.

In Par. VII, plaintiff alleges he suffered special damages by reason of the aforesaid conspiracy and acts done in furtherance thereof.

The web of intrigue, conflicting interests, breaches of trust, intentional misadvice and clearly interrelated activities of all the parties defendant as thus set forth in the complaint are relied on by appellant herein as a sufficient allegation, especially in the light of *Lyle vs. Hoskins*, supra, to state a cause of action for damages by reason of conspiracy between the defendants and acts done in furtherance thereof.

By stipulation (see Order, page 532 of Transcript of Record) it is admitted for the purpose of the Motion to Dismiss that threats were made on plaintiff and intimi-

dation practiced by one, B. J. Rask, in March, 1951, thereby adding to plaintiff's case something more than abuse of litigation and subtle maneuvering by McKelvy.

3. *Statute of Limitations.* State rules as to limitation of action will be applied by the Federal Courts in cases where jurisdiction is based on the diversity of citizenship and amount in controversy. *Moffet vs. Commerce Trust Co.*, 75 F. Supp. 303.

No ruling can be found wherein the Supreme Court of the State of Washington has ruled whether the two-year or the three-year statute of Washington applies to a civil conspiracy action. The matter appears to be one of first instance for this Court to determine.

In any event whether the two or the three year statute applies this action is not barred by the running of the statute of limitations as there were overt acts performed within a few months of the filing of plaintiff's original complaint.

For an exhaustive annotation on the subject of the running of the statute of limitations, see 97 A.L.R. 137, 152, citing numerous decisions of Federal Courts and state courts. The majority rule seems clearly to be that a conspiracy is a continuing offense and the statute does not start to run until the last of the overt acts done in furtherance thereof. This view has been adhered to in this case by Judge Lemmon, see page 259 last paragraph, Transcript of Record.

4. *Motion to File Supplemental Complaint Should Be Allowed.* The material set forth in plaintiff's Motion

for Order Permitting Filing of Supplemental Complaint, having been stipulated by all parties as being before the trial court, should be deemed part of the record and if there is an order entered herein reversing the trial court, then the said motion of plaintiff should be allowed, as the material is of vital significance and has a bearing not only on the matter of conspiracy but also on the Statute of Limitations.

5. *General.* For a proper understanding of this case, appellant respectfully submits that a brief review of the record is needed.

The original complaint (page 3, Transcript of Record) was 8 pages long and at the hearing on the motions of the several defendants to dismiss for failure to state a cause of action and on the grounds that the statute of limitations had run, Judge Bowen presided at the beginning of the hearing. It is quite apparent that he believed a cause of action was stated and that the statute had not run. Attention is respectfully directed to the remarks made by Judge Bowen particularly on page 33, Transcript of Record, where the Judge stated: "My thought is that in view of the facts that it promises to be lengthy in respect to the further arguments and I do not know how long my cold is going to last, I am inclined to feel for that reason that I should ask Judge Lemmon to hear the case. . . ."

Mrs. Curry then asked, "Your Honor means by 'the case' the motion?"

To which Judge Bowen replied, "*I mean the whole case.*" (Italics supplied.)

The case was then assigned to Judge Lemmon and from the Transcript of Hearing before Judge Lemmon it is clear that this Judge ruled only that the pleadings were not phrased with the nicety he required and voluminous suggestions were made to help plaintiff reallege his case in a manner sufficient to overcome a motion to dismiss. Thus while the Order of Dismissal was unequivocal, the transcript shows that it in fact was conditional and plaintiff was given leave to amend.

In the opinion by Judge Driver at the conclusion of the hearings on defendants' motion to dismiss the amended complaint (page 361, Transcript of Record, and following) it is again made abundantly clear that the fault lay only in lack of nicety of language, not in lack of merit, and again leave was granted to file a further amended complaint and suggestions were given as to ways in which the material set forth could be re-phrased so as to meet the requirements of pleading at least sufficiently to get past a motion to dismiss.

Second Amended Complaint was filed (page 367, Transcript of Record) and Judge Lindberg in his ruling from the bench (page 635, lines 14 ff., Transcript of Record) that the second amended complaint failed to cure the defects pointed out by Judges Lemmon and Driver but gave no reasons for his ruling.

Attention is respectfully drawn to the statements made and the authorities cited by Judge Driver in his opinion in the second full paragraph, page 363, Transcript of Record, to the effect that in passing on a motion to dismiss the complaint should be construed in

the light most favorable to plaintiff and *the motion should not be granted unless under no conceivable factual situation which might be established within the framework of the complaint could any relief be granted to the plaintiff.*

Appellant respectfully submits that while the second amended complaint may not have been worded with the nicety of a Blackstone, it certainly meets the tests of the authorities cited by Judge Driver and this Court should reverse the trial court and permit plaintiff to have his day in court in accordance with those fundamental principles upon which this nation was founded and adherence to which has made it the greatest nation on the face of the earth.

United States Court of Appeals
For the Ninth Circuit

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vs.

SAM MACRI, DON MACRI, and JOE MACRI, W. R. McKELVEY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

SAM MACRI, DON MACRI and JOE MACRI

STATEMENT OF THE CASE

The appellant has filed three complaints herein. The first two were dismissed with leave to amend, and the third (Second Amended Complaint) was dismissed with prejudice. It is from the Order of dismissing this Second Amended Complaint that the appellant has appealed to this Court.

SUMMARY OF ARGUMENT

1. The Second Amended Complaint fails to state a claim against the Appellees Macri upon which relief can be granted.

(a) No overt acts in furtherance of the alleged conspiracy are pleaded which are unlawful.

(b) No specific or general unlawful agreement is pleaded. No time of agreement is alleged—no terms of the conspiracy are set forth.

(c) The alleged overt acts of the Appellees set forth are not sufficient to plead a conspiracy.

2. The action is barred by the Statute of Limitations.

3. If the Second Amended Complaint was to be dismissed because it fails to state a claim against the Appellees Macri upon which relief can be granted the dismissal with prejudice is proper for two reasons:

(a) The Appellant requested it.

(b) A Motion to dismiss a complaint with prejudice is well taken when the complaint shows that the plaintiff cannot state a cause of action.

1. a. No Overt Acts in Furtherance of the Alleged Conspiracy Are Pleaded Which Are Unlawful.

The first pertinent mention of the Macris in the Second Amended Complaint is in paragraph VI thereof, and is as follows (Tr. 370):

“VI.

“That defendants and each of them willfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree

to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:

“(A) The defendants Macri in furtherance of said conspiracy willfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff, namely: willfully failing and refusing to make the excavations in a proper manner, willfully failing and refusing to do the grading in a proper manner and willfully failing and refusing to furnish the kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work, all designed and intended to and in fact causing plaintiff considerable unnecessary delay and greatly increased cost, and further, willfully and intentionally failing and refusing to make the payments required under said subcontract; all of which acts and omissions were continuous from the inception of work by the plaintiff to the end of the job, and although it was not known to plaintiff at the time of commission thereof, said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Company.”

The preliminary matter in paragraph VI is all-inclusive and vague — a buckshot charge to the effect that all the Appellees conspired to injure the Appel-

lant. In subdivision A thereof the Appellant speaks of the Macris only in relation to the contract violations. Now the Appellant does not set forth any unlawful acts of the Macris in subdivision A. The District Court, Judge Driver sitting, found that the Macris had breached their contract with the Appellant, and awarded Appellant damages in the sum of \$56,764.97, together with costs and interests because the Macris did those acts recited by Appellant in subdiv. A. Those actions, although rendering the Macris liable in damages to the Appellant were never declared to be unlawful, nor is there anything unlawful about them from their very nature. Judge Driver told the Appellant (Tr. 339) "I thought it was a hard fought, close lawsuit in which I might just as well have found against you as for you, it was that close." Further, we notice, although it deals with the question of the Statute of Limitations, these acts set forth in subdiv. A. all took place before the start of the Yakima lawsuit which was filed December 20, 1945. (Tr. 380.)

The next alleged overt act in furtherance of the conspiracy is recited in subdiv. B. of paragraph VI of the Second Amended Complaint, and reads as follows: (Tr. 371)

"(B) On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set out herein in full), terminating said joint venture agreement of December 11, 1943. Said alleged termination agreement was fictitious

and was executed solely to confuse the facts and deprive plaintiff of a cause of suit against Philp and Goerig.”

There was nothing unlawful in terminating this agreement. The Macris had the right to enter into it without the knowledge and consent of the Appellant, and had the right to terminate it without his knowledge and consent.

No further overt acts of the Appellee Macri are alleged until we come to subdiv. F. (Tr. 379) which reads:

“(F) In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons wherein are attached as Exhibit J, and by this reference made a part hereof as though set out herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff’s alleged breach of said second subcontract dated April 21, 1944, which said suit was malicious, willful abuse of legal process, was without any proper cause whatsoever, and was filed for the sole purpose of and in fact had the effect of drying up plaintiff’s credit, causing him severe damage to his business in Portland and reducing him to such an impecunious financial condition as to make it virtually impossible to continue the prosecution of the threatened suit in Yakima, Washington, and the filing of the suit in Oregon was possible only because of the omission of defendant McKelvy to terminate said second contract as heretofore alleged.”

The Appellant admitted to Judge Driver that there was a dispute between himself and the Macris (Tr. 340) and his complaints are replete with allegations to that effect. Certainly the Macris had as much right to institute an action against the Appellant as Appellant did six days later when he filed his action in Yakima. The starting of the law suit in Oregon was not an unlawful act, and since there was a dispute (which was eventually resolved in the Yakima case), was justified and was a lawful act. *Puget Sound Power & Light Co. v. Asia* (1921) 2 Fed.(2d) 491; *Abbott v. Throne* (1904) 34 Wash. 672, 76 Pac. 302, 65 LRA 826. Nor did filing such Oregon action "make it virtually impossible to continue the prosecution of the threatened suit in Yakima" as alleged, since it is also alleged that that action was filed six days after the Oregon action was filed. (Tr. 380.)

There are no further overt acts by the Macris alleged in the Second Amended Complaint unless one considers the actions of the Macris in defending themselves in the Yakima action from the Appellant, and their procedures in the appellate Courts. It is apparent that Appellant so considers them, but the law is to the contrary. *Puget Sound Power & Light v. Asia*, *supra*.

The net result of an examination of the Second Amended Complaint is that there is not one single act of the Macris which the Appellant has pleaded which is an unlawful act in furtherance of a conspiracy or otherwise.

b. No Specific or General Unlawful Agreement Is Pleaded. No Time of Agreement Is Alleged — No Terms of the Conspiracy Are Set Forth.

The Appellant relies on his general allegation in the preliminary portion of paragraph VI of his Second Amended Complaint to sustain his allegation of conspiracy. This writer has left the question as to what constitutes a conspiracy to his fellow counsel in the arguments in the lower Court, and will not prolong this brief by going into that subject save as it touches the acts of the Appellees Macri. At no time in his Complaint does the Appellant say when this conspiracy started or who started it. He does allege that the Macris didn't perform their contract with the Government in order to bankrupt him, but he never sets forth when and where the Macris and Continental Casualty Company and Mr. McKelvey ever met or discussed plans for his downfall or what those plans were. Appellant's contract with the Macris was signed on March 14, 1944 (Tr. 370). He fixes November 1, 1944, as the date on which Appellee McKelvey joined the conspiracy, not because Mr. McKelvey did anything on that date but because that was the date on which Appellant retained Mr. McKelvey (Tr. 372). Between those two dates, according to the Second Amended Complaint, the conspiracy was carried on by the Macris because they "willfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by the said Macris" (Tr. 371). The other conspirators, except Mr. McKelvey, are made conspirators for that period by the allega-

tion that "said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Co. (Tr. 371).

c. The Alleged Overt Acts of the Appellants Set Forth Are Not Sufficient to Plead a Conspiracy.

The Appellant argues backwards in his attempt to allege a conspiracy. His argument is that because each Appellee performed certain actions, therefore those actions arose out of a conspiracy and were the result of plans made by the conspirators. In other words, actions took place, so they must have been planned that way as the result of an agreement by all the Appellees to harm Appellant.

These actions of which the Appellant complains are more consistent with a lawful purpose than an unlawful one, and cannot be the basis of an allegation of a conspiracy. In *Dart v. McDonald* (1919) 107 Wash. 537, 182 Pac. 628 the Court said:

"It is true that it is not necessary, in order to establish the fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but, as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent with the intent to defraud."

Every allegation that is made in the Second Amended Complaint of any action of any defendant is of an action which is consistent with an honest purpose. Such being the case, the alleged overt actions of the various Appellees are not sufficient to sustain a pleading of conspiracy.

2. The Action Is Barred by the Statute of Limitations.

The Statutes of Limitations in the State of Washington which might apply to the allegations of the Second Amended Complaint are Sections 159 and 165 of Remington's Revised Statutes of Washington, and also now known as 4. 16.080 and 4. 16.130, respectively, of the Revised Code of Washington. For purposes of consistency with prior citations, we will refer to the Remington citations.

The applicable section of Rem. Rev. Stats. 159 is subdivision 4 which states that the Statute of Limitations for fraud actions is three years from the date of the discovery of the fraud by the aggrieved party. However, I do not think we need concern ourselves with that section because the Appellant in his brief on page 10 insists that this is a "civil conspiracy action." (He does say that the Supreme Court of the State of Washington has not passed on which of the two statutes applies, but if *Mitchell v. Greenough* (1938) 100 Fed.(2d) 184 is not decisive, it at least is most persuasive and a strong argument for the contention that the two year statute applies in the case of a conspiracy. That action was brought on the theory of a conspiracy. It was agreed by both parties that the two year statute applied. The unanimity of counsel on both sides, and the acceptance of their position by this Court, is most impelling.

When were the last unlawful acts of these alleged conspirators performed?

Whatever evil import the Appellant may give to

the actions of any of the Appellees prior to the time Continental Casualty Company gave notice of appeal to this Court (May 9, 1947) (Tr. 381) from the Judgment in the Yakima case, no reasonable contention can be made that any Appellee performed any unlawful act after that date. It is true that Appellant pleads that the appeal was taken; that Continental Casualty Company helped Macris perfect their appeal; that "three little words" were on the draft (although they were stricken before acceptance by Appellant); that Mr. McKelvey attempted to collect his bill — that these were all unlawful and thus overt acts in furtherance of the conspiracy, but I repeat no reasonable contention can be made to that effect.

This action was filed December 1, 1950 (Tr. 12), and the appeal in the Yakima case was taken May 9, 1947 (Tr. P381), which period of time is in excess of the time permitted by either Statute of Limitations.

3. If the Second Amended Complaint should have been dismissed because it fails to state a claim against the Appellees Macri upon which relief can be granted the dismissal with prejudice is proper for two reasons:

A. The Appellant requested it (Tr. 610).

B. A Motion to dismiss a Complaint with prejudice is well taken when the Complaint shows that the plaintiff cannot state a cause of action.

In *Foshee v. Daoust* (1950) CCA 5th Cir. 185 Fed. (2d) 23, the Court says:

"We need not cite or discuss cases relied upon by the plaintiff to the effect that in passing upon

a motion to dismiss the court will take as true all facts well pleaded and will not dismiss unless it appears that the plaintiff is not entitled to relief under any state of facts which could be proven. It is equally familiar doctrine that if it clearly appears from the complaint that on the facts pleaded the plaintiff will not be entitled to any relief, a motion to dismiss the claim is the proper procedure and should be sustained. Citing cases."

In *Gormaski v. Armour* (1948) 76 Fed. Supp. 752, the Court said:

"It does not appear from the averments of the complaint that the plaintiff can state a cause of action upon which he may hope to recover. This being true, it is the duty of the Court to sustain the Motion to Dismiss and this will be done."

The writer has sympathy for a citizen who cannot or will not have counsel represent him, but the writer also feels that the Appellant here has received more than his share of sympathy from the Bar and the Courts. The District Judges who have heard the arguments in this case, without exception, have been most kind and helpful to Appellant. They have made suggestions to guide him and have shown a great patience with him because he had no counsel. Their zealous efforts to keep pure the fount of Justice is commendable, and this Appellant cannot say that his rights were not protected and that he did not have his day in Court. However, Appellant has been unable to profit from the help given him because whatever cause of action he may have had against the Macris arising out of his dealings with them was ended and satisfied with the Judgment in the Yakima case. He never had any

cause of action against the Appellees McKelvey or the Continental Casualty Company, and if he ever did, his rights are barred by the Statute of Limitations.

Since it appears from the various complaints that Appellant cannot state a cause of action or claim, the dismissal with prejudice was proper, and the action of the lower Court should be sustained.

Respectfully submitted,

GRANVILLE EGAN

Attorney for the Appellees Macri

United States Court of Appeals
For the Ninth Circuit

M. C. SCHAEFER,

Appellant,

— vs. —

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY
and CONTINENTAL CASUALTY COMPANY, a Corpora-
tion,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE, W. R. McKELVY

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PAUL P. O'BRIEN

United States Court of Appeals
For the Ninth Circuit

M. C. SCHAEFER, *Appellant,*
— vs. —
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United States Court of Appeals

For the Ninth Circuit

M. C. SCHAEFER,	<i>Appellant,</i>	
vs.		
SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,	<i>Appellees.</i>	}
		No. 13129

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE, W. R. McKELVY

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

The appellant correctly states the questions involved and the manner they are raised on this appeal. The primary question is whether or not the complaint as amended states a cause of action against any defendant. The defendants separately filed motions to dismiss the complaint which motions were consolidated for hearing. Motions to dismiss the original complaint and amended complaint were granted with permission to the plaintiff to amend. The motions to dismiss the second amended complaint were granted with prejudice against filing an amended complaint and judgment of dismissal was entered in favor of all the

defendants (R. 532-534). The plaintiff appeals from this judgment.

The other question on appeal is whether or not the court erred in denying appellant's application to file a supplemental complaint. It was stipulated by all the appellees at the time this motion was presented, that for the purpose of the argument on the motions to dismiss, the allegations of the proposed supplemental complaint would be considered a part of the second amended complaint (R. 563). There is, therefore, no particular issue on this point.

For a proper understanding of the trial court's ruling, dismissing the action, it is necessary to consider the allegations of the second amended complaint (R. 367-498). It is voluminous and a reiteration in different form of the contents of the two previous complaints (R. 3, 42).

The following is a brief review of the second amended complaint:

The first five paragraphs allege jurisdiction; identify of the defendants; allege a prime contract obtained by the Macris on the so-called Roza Division, Yakima Project on December 7, 1948; allege Philp and Goerig became silent partners or joint adventurers with the Macris; and allege the plaintiff executed a subcontract with Macris for concrete work on the project on March 14, 1944.

Paragraph VI is the paragraph which attempts to allege a cause of action. First, there is a general allegation that the defendants with malice and intent to injure plaintiff in his performance of said subcontract

and otherwise did unlawfully and in accordance with preconceived plan confederate" to bankrupt plaintiff and ruin his business and credit. In furtherance of said conspiracy the defendants engaged in "a series of tortious acts" consisting of:

A, B.—Macris breached their contract with plaintiff in certain particulars (R. 371). Philp and Goerig entered into a fictitious termination agreement with the Macris on July 15, 1944 (R. 371).

C, D.—Defendant McKelvy became a "co-conspirator" on November 1, 1944, when plaintiff employed him to cancel the subcontracts with the Macris and sue in quasi contract. McKelvy undertook the employment and plaintiff divulged to him all facts with reference to the Macris' defalcation (R. 372). McKelvy then advised plaintiff (1) to finish the contract, which plaintiff did "under protest" (R. 376); (2) suggested "certain courses of action" rejected by plaintiff as constituting a fraud on his creditors (R. 376); (3) delayed bringing the suits and on October 20, 1945, terminated the employment advising plaintiff that Continental Casualty Company was a client of his office and further advising plaintiff the statute of limitations would run against his lawsuit in "about" a month (R. 377). Concludes all of McKelvy's conduct was motivated by an intent (a) to bankrupt and disgrace plaintiff and (b) to stall the lawsuit against the Macris until the statute of limitations had run, which was prevented by the diligence of plaintiff (R. 378).

E.—Plaintiff employed a Yakima attorney and proceeded with his lawsuit against the Macris (R. 378).

(Appellant in open court stated he employed the particular Yakima attorney on the recommendation of McKelvy and after he had asked for the name of a good attorney to bring the suit (R. 356, 497-498)).

F, G.—A suit was instituted in Oregon by the Macris against plaintiff which was “willful abuse of legal process” (R. 379). Plaintiff brought a suit in Yakima County, Washington, against the Macris and Continental Casualty Company through the attorney recommended by McKelvy (R. 380). (This suit was tried before the Hon. Sam M. Driver, Judge, and resulted in a judgment for plaintiff in the sum of \$57,-686 and interest (R. 462)). Memorandum opinion of the trial judge in the Yakima suit is set forth in Exhibit M to the complaint (R. 438).

H.—Conspiracy was “furthered” by the Macris, Philp and Goerig and Continental Casualty appealing the Yakima judgment to the Circuit Court, which court affirmed the judgment of the trial court (R. 382) and after a petition for rehearing being denied a petition for a writ of certiorari to the United States Supreme Court was filed and denied as well as a rehearing thereon (R. 381-382).

I.—Judgment was paid by Continental (R. 383).

J.—McKelvy asked plaintiff to pay for services rendered (St. 383-4).

K.—Plaintiff sought to engage his Yakima attorney to bring this lawsuit and was refused (R. 384).

Paragraph VII attempts to allege damages by the statement that by reason of “the premises aforesaid and all of the acts and omissions of defendants and

each of them in furtherance of their aforesaid pre-conceived and concerted plan and conspiracy and as the direct and proximate result thereof," plaintiff had no personal credit with which to conduct his business, suffered severe financial losses as the result of the curtailment of his business activities, suffered damage to his reputation and suffered mental anguish, and was prevented developing and marketing certain inventions all to his damage in the sum of \$1,000,000 (R. 385).

Defendant McKelvy moved to dismiss this complaint on grounds a cause of action was not alleged and the Statute of Limitations barred any cause (R. 499). Like motions were interposed by Continental and the Macris (R. 500, 502). These motions were consolidated for hearing and were heard before the Hon. William J. Lindberg, Judge, on August 6, 1951 (R. 555) and judgment of dismissal entered August 7, 1951 (R. 532) and plaintiff appeals.

At the time of the hearing of the motions directed to the second amended complaint, the plaintiff filed a motion for an order permitting the filing of a supplemental complaint (R. 516). This motion alleges McKelvy represented Macri and Continental in other litigation. The motion incorporates a request to add the name of B. J. Rask as party defendant, alleging that the said Rask called on the plaintiff in March, 1951, and threatened "the life and welfare of the plaintiff and his family" if he persisted in the instant litigation (R. 517). The appellees stipulated in open court that the allegations of the motion would be considered

a part of the second amended complaint in the hearing on the motions to dismiss the second amended complaint (R. 563).

There is incorporated in the record affidavits disclosing a dispute with Judge Lindberg's official court reporter (R. 548) which has no bearing on the issues of this appeal.

Appellant has incorporated in the record a transcript of the argument and proceedings on the hearing of the motions to the three complaints. The hearing on the motions directed to the original complaint were heard before Hon. Dal M. Lemmon, Judge, on January 11, 1951 (R.215). The motions to the amended complaint were heard before the Hon. Sam M. Driver, Judge, on April 16, 1951 (R. 279), and the motions to the second amended complaint were heard before the Hon. William J. Lindberg, Judge, on August 6, 1951 (R. 555).

ARGUMENT IN SUPPORT OF ORDER OF DISMISSAL

Appellee McKelvy respectfully submits the memorandum of authorities in support of his motion to dismiss the second amended complaint is an adequate citation of legal authority to support the trial court's decision and order dismissing the complaint as to all of the parties (R. 519). This memorandum is entitled against "third amended complaint" which is a typographical error. The third complaint was considered but it was the second amended complaint.

There are three essentials to tort liability in conspiracy. The complaint in this case lacks all three. They are (1) facts must be alleged, not conclusions; (2) an agreement or concert of action disclosing a meeting of minds must appear from the allegations; and (3) damages must be alleged.

In addition, the complaint in this cause on its face shows that as far as defendant McKelvy is concerned the statute of limitations has run.

The appellant in this case predicates a cause of action on the normal legal procedure involved in his success in obtaining compensation for the breach of contract by Macri of the subcontract with appellant. Appellant considers the fact he was successful in litigation concerning this breach justifies a further claim based on the inconvenience and expense involved. He has chosen to level a charge of "conspiracy" against every party who in any manner became a part of the parade of events between the date of execution of the subcontract with the Macris March 14, 1944 (R. 370) to final payment of the judg-

ment by Continental, the bondsman, on March 19, 1949, and even afterwards, when a request by McKelvy was made for payment of services rendered (R. 383) and his counsel refused to institute the instant litigation (R. 384). All the grievances which appellant cites are events and procedures normal in litigation and business transactions and in no way a violation of any right of appellant nor compensable through the court except, of course, his claim against the Marcris for which he obtained judgment and the judgment paid (R. 383).

No Overt Act Performed No Concert of Action

The terms "conspire" or "malice" do not create a cause of action or state that a right has been violated. The tort of "conspiracy" is based on recovery of damages for an injury suffered by an unlawful act or a lawful act performed unlawfully pursuant to a formed conspiracy.

11 Am. Jur. "Conspiracy", Sec. 45.

The gravamen of civil liability in conspiracy is found in the overt act which is the result of conspiracy and culminates in damage to the plaintiff.

Nalle v. Oyster, 230 U.S. 165;

Sears v. Interational Brotherhood of Teamsters, etc., 8 Wn.(2d) 447, 112 P.(2d) 850;

Park-In Theatrest v. Paramount-Richards Theatres (D.C. Del.) 90 F. Supp. 727;

Roche v. Blair, 305 Mich. 628, 9 N.W.(2d) 861.

The *Nalle* case is the classic authority cited by all the courts of American jurisprudence that no recovery can be had for civil conspiracy unless there is an overt act resulting in damage.

The overt act which is the basis of liability must be done pursuant to a conspiracy. No formal agreement is necessary but a tacit understanding or concert of action in which the minds of the parties have met for a common purpose or design is necessary.

Kietz v. Gold Mines, Inc., 5 Wn. (2d) 224, 105 P. (2d) 71;

Calcutt v. Gerig (6 Cir.) 271 Fed. 220;

Puget Sound Power & Light v. Asia (D.C., Wash.) 2 F. (2d) 491;

Ransom v. Matson Nav. Co. (D.C., Wash.) 1 F. Supp. 244;

City of Atlanta v. Cherry, 84 Ga. App. 728, 67 S.E. (2d) 317;

Windsor Theatre Co. v. Walbrook Amusement Co. (D.C., Md.) 94 F. Supp. 388;

Asby v. Peters, 128 Neb. 338, 258 N.W. 639; 15 C.J.S. "Conspiracy", Secs. 1, 2.

In the *Ransom* case, the plaintiff sued several persons alleging they all "conspired" to "shanghai" her out of Honolulu to Yokohama on one steamship line and then another from Yokohama to Seattle, where she was taken by force to the city hospital and jail and charged with insanity. There were numerous other allegations of assault and slander. The court recognized that many of the allegations alleged torts but the complaint failed to disclose a concert of action demonstrating

a meeting of the minds and the terms "conspiracy" or "malice" added nothing to the complaint.

"The mere statement that the parties conspired, or that there was conspiracy, is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, co-operation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise."

The general words "conspiracy" and "malice" are but conclusions of the pleader. It is necessary that facts be alleged from which the natural inference is that there was a concert of action to do something illegal which results in harm to the pleader.

Puget Sound P. & L. Co. v. Asia (D.C. Wash.)
2 F.(2d) 491;

Black & Yates v. Mahogany Ass'n (3 Cin.)
129 F.(2d) 227;

MacGriff v. Antwerp, 327 Mich. 220, 41 N.
W.(2d) 524.

The third circuit in the *Black & Yates* case cited above said:

"A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment."

In the *Puget Sound P. & L.* case the court said:

"The phrase 'conspired and confederated' are impotent in a civil action, and to give potency facts must be set out which show malicious conduct."

The overt act necessary to a conspiracy action must, as a general rule, be such as to give rise to individual liability in order to create a liability for others in the plan.

Manhattan Quality Clothes, Inc. v. Cable,
154 Wash. 654, 283 Pac. 460;

Hutchinson Realty Co. v. Hutchinson, 136
Wash. 184, 239 Pac. 388;

Nalle v. Oyster, 230 U.S. 165;

Harding v. Ohio Cas. Ins. Co., 230 Minn. 327,
41 N.W.(2d) 818;

Glenn Coal Co. v. Dickinson Fuel Co. (4 Cir.)
72 F.(2d) 885;

Miller v. Ferguson, 55 Cal. App. 502, 203
Pac. 772;

Lynch v. Rheinschild, 86 Cal App. 672, 195
P.(2d) 448;

Elmhurst v. Shoreham Hotel (D.C. D.C.)
58 F. Supp. 484;

Nathanson v. Brown & Williamson Tob. Co.,
189 M. 1024, 68 N.Y.S.(2d) 914;

Interstate Holding Corp. v. Hammerman
(1950) 101 N.Y.S.(2d) 648.

The only time that an act lawful in itself can become unlawful by combination is where the mere force of numbers create an unusual circumstance which results in injury to a third party and then only when the act of the group does not have the excuse of self-interest or competition.

11 Am. Jur. "Conspiracy", Sec. 46;

Delorme v. International Bartenders' Union,
Local 624, 18 Wn.(2d) 444, 139 P.(2d)
619;

Shaltupsky v. Brown Shoe Co., 350 Mo. 831,
168 S.W.(2d) 1083;

Neustadt v. Employers Liability Assur.
Corp., 303 Mass. 321, 21 N.E.(2d) 538;

Liappas v. Angoustics (Fla. 1950) 47 So.
(2d) 582.

In the instant case no single defendant was induced to do anything by the other defendants and none of them did anything in defending the lawsuit except what was legitimate in protecting their individual interests. This they have a right to do.

If there was originally a conspiracy to breach the contract with the Macris, certainly McKelvy was not a party to that conspiracy as conspiracy applies to future events not past ones.

Ransom v. Matson Nav. Co. (D.C., Wash.)
1 F.S. 244;

Harding v. Ohio Cas. Ins. Co., 230 Minn. 327,
41 N.W.(2d) 818.

Appellants in open court said it was the circumstance of delay in bringing the suit rather than any agreement or understanding with any other defendant that was the basis of his suit against McKelvy (R. 336).

There is nothing in appellant's complaint which were not justified in defending the appellant's charges in the Yakima suit. Fraud or conspiracy cannot be insinuated.

Cox v. Cox, 259 Wis. 259, 48 N.W.(2d) 508;

City of Atlanta v. Cherry, 84 Ga. App. 728,
67 S.E.(2d) 317;

Windsor Theatre Co. v. Walbrook Amusement Co. (D.C., Md.) 94 F. Supp. 388.

The record discloses the trial judge in the Yakima suit who heard the motions in this case directed to the second amended complaint stated in open court that not only was the bonding company justified in defending the suit but he would have considered the agents derelict in their duty in not doing so (R. 339).

Where conduct alleged in a complaint as the basis of a conspiracy is as consistent with the doer's self interest as a malicious purpose to injure another, it must be assumed to be the former and legal.

It would be indeed a dangerous thing for the courts to hold an unsuccessful defending litigant responsible for additional damages because he saw fit to assert a defense to litigation instituted against him.

In *Puget Sound Power & L. Co. v. Asia* (D.C. Wash.) 2 F.(2d) 491, the court said:

"The only act charged against defendant is the bringing of an action in the state court, a court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue (*Savile v. Roberts*, 1 Ray. 374), and having a right to sue the law does not inquire into the motives (*Clark v. Clapp*, 14 R.I. 248; *Robertson v. Montgomery B.B. Ass'n*, 141 Ala. 348, 37 So. 388, 109 Am. St. Rep. 30, 3 Ann. Cas. 965).

"A court will not presume that a court of com-

petent jurisdiction will permit itself to be made the instrumentality through which an unlawful purpose may be accomplished."

A litigant defending fancying he has a right to defend must be accorded that privilege with immunity.

See also:

Manhattan Quality Clothes v. Cable, 154 Wash. 654, 283 Pac. 460;

Cattlett v. Chestnut, 108 Fla. 475, 146 So. 547;

Moffett v. Commercial Trust Co. (D.C. Mo.) 87 F. Supp. 438, Aff. 187 F.(2d) 242 (8 Cir.), Cert. d., 96 L. ed. 29, 96 L. ed. 66;

Interstate Holding Corp. v. Hammerman, 101 N.Y.S.(2d) 648;

Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 168 S.W.(2d) 1083;

Burns v. Spiller (D.C., D.C.) 4 F.R.D. 299.

Washington in the *Manhattan Quality Clothes Co.* case held that a suit would not lie for malicious prosecution without the arrest of the person or attachment of the property. Use of the courts is not sufficient as the basis of a lawsuit unless in an extreme case there has been an abuse of process by party plaintiff and then it must appear that there is no grounds whatsoever for an assertion right through the court.

Eyak River Packing Co. v. Huglen, 143 Wash. 229, 255 Pac. 123, 257 Pac. 638.

It is doubtful that American jurisprudence discloses a single case where a successful litigant sues to recover because his claim has been defended. There are several

cases where an unsuccessful litigant has attempted to recover charging the litigation to be fraudulent and the courts universally have dismissed them. Such a case is *Moffett v. Commercial Trust Co.* (D.C. Mo.) 87 F. Supp. 438, and the court said:

“All the averments of the complaint show that the challenged acts or decisions were done or rendered in the regular course of judicial procedure after due process.”

And quotes from *Snowden v. Hughes*, 321 U.S. 1:

“The lack of any allegation in the complaint here, tending to show a purposeful discrimination * * * is not supplied by the opprobrious epithets “willful” and “malicious” * * *.”

On appeal the Circuit Court, 187 F.(2d) 244, said:

“All that the complaint in the present case charges against the individual defendants is that by their resort to the State courts for the settlement and administration of complicated estates the plaintiff, as one of the interested parties, has been involved in expensive, prolonged, and generally unsuccessful litigation. * * *”

Damages Are Not Alleged

Appellant in Paragraph VII of the second amended complaint (R. 385) attempts to allege damages by the general statement that he suffered financial losses, damage to his reputation and mental anguish and that he was prevented in developing and marketing certain inventions. We will not prolong this brief unnecessarily to discuss the conjectural nature of the damages claimed and the impropriety of seeking damages for mental anguish in this kind of action. Suffice it to say

that no damages are alleged because there are no facts which show damages to result as a natural consequence of any act of any of the defendants except the breach of the Macris, which was fully compensated for in the judgment secured and paid in the Yakima suit.

The gist of an action in conspiracy is the damage not the conspiracy.

Moyer v. Cordell (Okla.) 228 P.(2d) 645;

Lallathin v. Keaton, 198 Okla. 312, 178 P. (2d) 101;

Hoffman v. Johnston (Ohio) 36 N.E.(2d) 184;

15 C.J.S. "Conspiracy," Sec. 6.

The damage must appear upon the face of the complaint to be a natural consequence of defendant's act. A causal connection between the acts alleged and the damage claimed must appear.

Orloff v. Metropolitan Trust Co., 17 C.(2d) 484, 110 P.(2d) 396;

Hoffman v. Johnston (Ohio) 36 N.E.(2d) 184;

Foster and Kleiser Company v. Special Site Sign Co. (9 Cir.) 85 F.(2d) 742, Cert. d. 299 U.S. 713;

15 C.J.S., Sec. 26.

In the C.J.S. referred to, we find the following language:

"It is not sufficient simply to state that damage did in fact result; but the facts should be alleged from which the court can see, if the facts are

true, the damage which would naturally or possibly result from the act stated.”

The allegation of damages cannot be a mere conclusion of the pleader.

In *Farmers Elevator Service v. Hogan* (D.C., Mo.) 8 F.R.D. 230, the Missouri District Court said:

“* * * And the complaint must be sufficient to show damages by reason of the wrongful acts complained of. 25 C.J.S., Damages, §130, page 745, 746. Furthermore, a complaint must show how the plaintiff sustained his damages. *Pacific Coin Lock Co. v. Coin Controlling Lock Co.*, 9 Cir., 31 F.(2d) 38. See also *B. F. Avery & Sons v. J. T. Case Plow Works*, 7 Cir., 174 Fed. 147. And it is held by the text writers that it is not sufficient to allege damages as a mere conclusion of the pleader. 25 C.J.S., Damages, §130, page 748.”

Moreover, damages claimed in conspiracy where no public wrong is involved are speccial damages and must be pleaded as such.

Catlett v. Chestnut, 108 Fla. 475, 146 So. 547.

As in the case of fraud so in the case of civil conspiracy, facts must be averred which show a concurrence of fraud and damage.

Puget Sound Power & Light v. Asia (D.C., Wash.) 2 F.(2d) 491.

There is no allegation in the complaint which shows or indicates any act of any of the defendants and in particular any act of McKelvy caused any damage to the appellant. He alleges he employed McKelvy to

bring a lawsuit and McKelvy was dilatory in the matter. He employed another attorney and obtained what the trial court stated was almost a 100% victory.

“THE COURT: This I must say is a unique and a very unusual experience for me. It’s difficult for me to understand, but I’m trying to get your point of view. Here’s a case that was a very close and difficult one, I think. I happen to know Mr. Olson was very much concerned about it and didn’t think his chances were too good of winning in the Court of Appeals; I thought the chances were not much more than even. I wouldn’t have bet one way or another what the Court of Appeals would have done. You were well represented. Mr. Olson presented the case very well. * * *. You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It’s a queer situation. I think perhaps you’ve come to the realization which many litigants don’t, that litigation necessarily and unfortunately is expensive, and that it isn’t as profitable even for the winner as is sometimes thought.” (R. 338-339)

Statute of Limitations Has Run Against Any Claim Against McKelvy

The statute of limitations has run against any claim against appellee McKelvy. The complaint alleges appellant employed McKelvy on November 1, 1944, and the employment was terminated in October, 1945 (R. 342, 377). The statute applicable is either Remington’s Revised Statutes, Section 159, or Section 165. The pertinent part of Section 159 reads:

“An action for taking, detaining, or injuring personal property, including an action for the

specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated.”—is barred in three years

Section 165 reads as follows:

“An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.”

It has been recognized generally that the two-year statute applies to causes in conspiracy.

Mitchell v. Greenough (9 cir.) 100 F.(2d) 184;

Theurer v. Condon, 34 Wn.(2d) 448, 209 P.(2d) 311.

The complaint at most alleges that McKelvy conspired with the others to injure appellant by not bringing the lawsuit against the Macris after he had agreed to do so and this caused injury to appellant's credit and reputation. The only other allegation pertaining to McKelvy in the complaint is that found in Paragraph VI, J, which alleges that McKelvy requested appellant to pay for his services. Appellant filed his complaint in the District Court for the Western District of Washington, Northern Division, Cause No. 2673, on December 1, 1950 (R. 12).

There is a distinction between criminal and civil conspiracy so far as the application of the statute of limitations is concerned. In criminal conspiracy, the general rule seems to be that the statute runs from the last overt act performed to accomplish the conspiracy. The rule in civil conspiracy is of necessity different because civil conspiracy is based upon recov-

ery of damages for injuries inflicted by the overt act. Liability attaches upon the execution of the overt act which results in damages.

11 Am. Jur., "Conspiracy," Section 45, page 567, Note 18;

Nalle v. Oyster, 230 U.S. 165.

The statute of limitations therefore must run from each overt act which results in damage unless, of course, there is continuing series of acts performed in a contemplated course of action.

Burnham Chemical Co. v. Borax Consolidated (9 Cir.) 170 F.(2d) 569, Cert. d. 336 U.S. 924;

Momand v. Universal Film Exchange (1 Cir.) 172 F.(2d) 37, Cert. d. 336 U.S. 967, 337 U.S. 934, 337 U.S. 961;

Williamson v. Columbia Gas & Electric, 186 F.(2d) 464;

Glenn Coal Co. v. Dickinson Fuel Co. (4 Cir.) 72 F.(2d) 885;

Moffett v. Commercial Trust Co. (D.C., Mo.) 87 F. Supp. 438.

Appellant's Motion to File Supplemental Complaint

The appellant specifies as error the court's denial of his motion permitting the filing of supplemental complaint. There is no reversible error in this matter because the court on stipulation of all the appellees considered the allegations of the motion as part of the second amended complaint (R. 563). The matter would be consequence only in case this court reversed the

trial court's order dismissing the action in which case the appellant would automatically be entitled to a ruling of the trial court on his application to name Mr. Rask a party defendant.

This motion has no bearing on the issue of this appeal.

APPELLANT'S BRIEF

This appellee has in effect met any argument of appellant's brief by the foregoing argument. Appellant cites *Lyle v. Haskins*, 24 Wn.(2d) 883, 168 P.(2d) 797, to the effect that the Washington Supreme Court holds that conspiracy can be alleged by circumstantial evidence. This case held that proof of a conspiracy like an other fact may be established by circumstantial evidence. A conspiracy may be alleged through a set of circumstances which compel an inference of confederation but that is not the case here. No tortious acts are alleged and the acts alleged are consistent with the parties self interest and repel any inference of malice.

The allegations of appellant's complaint as far as conspiracy is concerned are "impotent" words of "combine", "conspire", "confederate" and "conspiracy" no illegal act by any of the parties appellees is alleged and particularly nothing of a tortious nature by Mr. McKelvy.

The reference in appellant's brief, page 8, to subparagraphs C and D of Paragraph VI of the Second Amended Complaint demonstrates how the pleader attempts to insinuate the missing allegations. In fact he has pleaded himself out of court when he charges

McKelvy "attempted to accomplish the aforesaid ends of said conspiracy and almost succeeded," admitting thereby that no damage was done.

The copy of the proceedings before Judge Bowen found on pages 11 and 12 insinuates that Judge Bowen adjudged a cause of action was alleged. The appellees were simply interested to know what the effect of the order of transfer was, that is, whether or not it was for the particular motions or all of the proceedings involved in the litigation.

Appellant has cited no authority to sustain his position that his extremely verbose complaint alleges a cause of action.

MISSTATEMENT IN COMPLAINT

This court may take judicial notice of its records in any case.

Atlantic Fruit Co. v. Red Cross Line (2 Cir.) 5 F.(2d) 218;

In re Robinson, 9 Wn.(2d) 525, 115 P.(2d) 734;

31 C.J.S., "Evidence," Sec. 50, page 624, notes 44 and ff.

Therefore, it is proper for this court to notice the record on appeal of Mr. Schaefer's Yakima case, *Continental Casualty Company v. Schaefer*, Cause No. 11707 (173 F.(2d) 5) and other cases involving Continental Casualty Company, in which Mr. Schaefer was not a party litigant, *Goerig et al. v. Continental Casualty Company*, Cause No. 11723-11726, incl. (167 F.(2d) 930).

Appellant has alleged that Willard E. Skeel of this appellee's law firm appeared as attorney of record representing Continental Casualty Co. in the appellant's litigation in Yakima. This statement appears in sub-paragraph D of Paragraph VI of the Second Amended Complaint (R. 377). Exhibit I, referred to in this paragraph, on its face bears the number 246 and the title, "*U.S.A. for the Use of M. C. Schaefer, etc.*" (R. 415). Then appears as a record of the proceedings part of the record in another lawsuit in which Continental Casualty Company was a party and in which Mr. Willard E. Skeel was attorney of record for Continental Casualty. This case was tried on February 21, 1947, and was consolidation of five "Use" cases numbered 250, 251, 255, 257 and 267, brought up to the Ninth Circuit Court in causes numbered above. The case which Mr. Schaefer brought was known in the trial court as No. 246 and was tried in Yakima on February 24, 1957 (R. 461). Neither Mr. Willard E. Skeel nor anyone connected in any way with this appellee's law firm represented any party in this litigation. The same trial judge heard Mr. Schaefer's cases and the five consolidated "Use" cases. This judge called to Mr. Schaefer's attention at the time of the hearing of the motions in this case directed to the amended complaint, that Mr. Eugene D. Ivy of Yakima was the attorney of record for Continental Casualty Company in the litigation which this appellant instituted in that court (R. 351).

This appellee calls these facts to the attention of the court in order that there may be no misunderstanding as to Mr. Willard E. Skeel's conduct with refer-

ence to representation of Continental Casualty Company.

CONCLUSION

It is, therefore, respectfully submitted that the trial court's order and judgment of dismissal must be affirmed and the complaint against this appellee dismissed because no cause of action is alleged against appellee McKelvy in conspiracy; no unlawful act is alleged nor the unlawful performance of an act; no overt act in pursuance to a conspiracy is alleged in the complaint; all the facts alleged show conduct of the parties which was legal and for which they cannot be held accountable for any resultant injury to the appellant; no damage is alleged and the statute of limitations has run against any cause of action against appellee McKelvy.

Respectfully submitted,

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ALTHA P. CURRY,
SKEEL, MCKELVY, HENKE, EVENSON
& UHLMANN,

Attorneys for Appellee W. R. McKelvy.

United States
COURT OF APPEALS
for the Ninth Circuit

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R.
McKELVY and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Appellees.

REPLY BRIEF OF APPELLANT
M. C. SCHAEFER

Replying to Briefs of Appellees:
W. R. McKelvy,
Continental Casualty Company,
Sam Macri, Don Macri and Joe Macri.

M. C. SCHAEFER, *Appellant,*
Per Se.

3535 E. Burnside St.
Portland, Oregon

FILED

APR - 4 1952

PAUL P. O'BRIEN
CLERK

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Sam Macri, Don Macri and Joe Macri.

ARGUMENT

First, let me congratulate counsel for the Defendants. They have so skillfully handled what little they have had to work with that their briefs standing alone might be persuasive to persons not familiar with the facts. Hence, I again urge that this court *read all of the transcript carefully!*

Next, let me show in plain, simple language of a layman just what happened.

My story begins early in 1944. At that time defendant W. R. McKelvy, a prominent Seattle attorney, represented defendant Continental Casualty Company. As a matter of fact, so did Willard Skeel and other members of the firm of Skeel, McKelvy, Henke, Evanson & Uhlmann. This firm had been general counsel in Washington for Continental Casualty Company for years before and still is.

Sam Macri, Don Macri and Joe Macri were partners, with Sam Macri the head of the firm. They had a large volume of contracts with the Government and with the State of Washington and now manage three or four companies doing a huge volume of business. But the head of the Macri Organization I dealt with, Sam Macri, during the time I was involved with them, while testifying under oath that he personally figured the job of which I had taken a part, and had been in the construction business 26 years, *could not even read the simplest figures* on a plan (See Transcript of Testimony in case No. 11707—Circuit Court of Appeals—Ninth Circuit, Pages 1422 ff. and 1656 ff.). Yet, despite the complete lack of qualification of the Macris to engage in any kind of construction work, Continental Casualty Company in all Macris' deals issued bonds guaranteeing their performance and payments. Why? Were the Macris merely fronting for Continental Casualty Company or McKelvy and Skeel? Then in addition we find Clyde Philp, attorney-in-fact for Continental Casualty Company, who is a partner with one Goerig, and the two are silent joint venturers with the Macris on the jobs I was involved with and many others before and after. Note that Philp by reason of his posi-

tion as attorney-in-fact knows or can determine amounts of other bids being submitted and can therefore tip off someone fronting for him and others as to what figures to bid without doing any estimating of their own.

While it does not directly concern this case, the combination of persons outlined above existed for some time before I got innocently involved with them. This group has a reputation among others who have dealt with them that the things they did to me were part of a consistent pattern of what they do to others who come in touch with them.

Such was the basic set-up when I came into the picture by taking a subcontract with the Macris early in 1944, although I didn't learn of it until later on.

I think and have tried to show that all this is wrong to allow an attorney to mishandle the trust and confidence of his clients and in conspiracy with a bonding company and a pseudo-contractor as a front and in partners with the attorney-in-fact for the bonding company, who is in a strategic position to know other prospective bidders' figures, try to drive legitimate contractors into slavery to them or else by every means at their command including threats of physical violence and intimidation try to drive them out of business. This is wrong not only in its immediate and direct effect on the parties involved but also wrong to permit it to continue and possibly spread elsewhere throughout the world where weak and short-sighted men may be found who are willing to yield. I refuse to yield. With truth and confidence in Christ there is no excuse for accept-

ing the intimidations of a power having existence only in mortal belief. I am subordinate to no circumstances and to no person—only to the one true power and being eternal, God.

To continue my narrative, watch how the pattern of intrigue unfolds!

First, the Macris failed to do their preliminary work timely or properly and failed to supply proper or adequate quantities of material causing me extra cost and delay. Then they failed to pay me even the basic amounts required under my contract. The financial aspect was getting serious after several months of this.

Then I began to hear stories from others who had been similarly treated by the Macris. Becoming concerned, I sought from W. R. McKelvy what I thought was competent legal help to (1) terminate the one contract I was then working on and attain the reasonable value of the work done to date, and (2) to terminate a second subcontract with the Macris, work on which had not commenced.

So, I unwittingly walked into Mr. McKelvy's office. I told McKelvy everything—my finances, my problems, the parties involved, namely (so far as I then knew), Continental Casualty Company and the Macris, and what I wanted done. McKelvy accepted this employment, assured me my desired results would be obtained, possibly by negotiation between him and one Tom Holman, an attorney formerly associated with McKelvy's office and with whom McKelvy claimed to have a very close relationship and who McKelvy said represented

the Macris. Mr. Skeel, Sr., sat in on part of this conference. In the transcript (pp. 407-410) you will note that by interoffice memo prepared shortly after I retained McKelvy, he and one of the men in his office confirmed that a cause of action existed and indicated what the grounds and procedure were. It is interesting to note that this memo was inadvertently handed to me by McKelvy when I called his hand in October of '45 and he was so shaken and upset he was not aware he was giving me this item when he turned my files back to me.

But to continue my story with McKelvy, first he dragged me on for some time on the excuse he was negotiating with Macris' attorney; then he told me that by reason of a strictly phony, put-up job involving the son of one of the Macris (who had been arrested for embezzlement), the assets of the Macris had all been safely hidden and that chances of my prevailing in a suit against Continental Casualty were slim. In the meanwhile he kept promising me that suit was being prepared by his office and would soon be ready to file. McKelvy later suggested that I convey all my property to my brother or someone I could trust and beat my creditors. He told me at the time about a similar maneuver by another contractor resulting in beating a bank out of \$83,000 and that he, McKelvy, was able to get the contractor cleared. I refused to engage in this fraud.

A few days thereafter McKelvy failed to keep an appointment with me; and was so obviously stringing me on that I walked into his office unannounced on October 20, 1945, for a showdown. McKelvy then told me

he couldn't file suit against Continental Casualty Company as they were one of his firm's biggest accounts, and in response to my question: "How much time do I yet have?", stated that I had only about a month in which to file. He then handed back my file and because of his being so unnerved also gave me part of his file. McKelvy thus attempted to string me on till I was barred by the statute of limitations or by committing a fraud.

I did thereafter retain another attorney who first notified the Macris that suit would be filed on a day certain if my claim was not previously paid. The day before the deadline given the Macris a purely fictitious suit was filed by the Macris against me in Portland on the second subcontract mentioned above. I assert that this second subcontract was intentionally left open to give the several defendants herein one more chance to snow me under financially. A letter was supposedly written by McKelvy for the purpose of terminating this second subcontract (see p. 411 Transcript of Record) but his firm denied it was sent and Macris denied receiving it.

This Portland suit was, after much expense and bother to me, set forth in my Yakima suit as a counter claim and on the hearing before Judge Driver was summarily dismissed and judgment was given to me for \$1.00—incidentally not yet paid. I was in such a precarious financial condition that even another straw could break me, and the defendants no doubt intentionally saved this one item thinking it would be that straw. By almost superhuman effort I kept it from being so.

Then followed the litigation. First, Continental Casualty Company itself informed my attorney in Yakima of the involvement of Philp and Goerig and asked me to amend and name them as additional defendants, assuring me that Philp and Goerig were financially very well off and that I could probably collect any judgment from them. Yet Continental Casualty Company knew then that a year and a half before Macris and Philp and Goerig had terminated their joint venture and were not liable to me. Continental Casualty Company and McKelvy also tried by subtle suggestion to get me to sue in damages for breach of contract, knowing if I did that Continental Casualty Company would be relieved under its bond; that Philp and Goerig were released by reason of an alleged termination agreement with the Macris and that the Macris would be relieved by reason of hiding their assets and assigning to a bank the only assets subject to execution. Fortunately, I forestalled that maneuver by suing in quantum meruit (contrary to suggestion of my attorney). After judgment in my favor in the trial court at Yakima against Continental Casualty Company and Macris (the trial Judge holding that as to me, Philp and Goerig were out by reason of the termination agreement) came a most flagrant and wilful abuse of the judicial processes. The time for appeal by the defendants Macris expired with no action having been taken by them, but Continental Casualty Company filed a separate appeal timely, hence the Circuit Court of Appeals then permitted the Macris to file anyway. All the way through this whole course of litigation it was the Continental Casualty Company *which led the way*,

and every conceivable device to cause me delay and added cost was used by the Continental Casualty Company and their co-conspirators; and even when the time came finally to pay the judgment the attorneys of Continental Casualty Company had to get McKelvy's approval to delete certain words from the release language on the back of the draft. It is interesting to note the claim by Macris' attorney that I broke the Macris as a result of this judgment. The judgment against them, and also against Philp and Goerig, in favor of Continental Casualty Company has never been paid and the Macris now head and operate several firms doing a large volume of business; and Philp is still engaged in construction work; and Continental Casualty Company is still bonding the Macris. Abuse of legal proceedings is actionable as conspiracy. See 11 Am. Jur., p. 584, Sec. 52, and cases therein cited.

Always running through this is the obvious thinking of the Defendants that at any one of the steps they might succeed in killing me off because I might not be able financially to follow through.

And speaking of killing me off, I have been personally threatened by a B. J. Rask if I persist in this suit. He is indirectly associated with the Macris and could have entered the picture to attempt to intimidate me only by reason of concert with the other Defendants. The attorney for the Macris at the last hearing in Seattle made similar intimidating remarks and hints of foul play. Following is a verbatim copy of affidavit I recently filed in this court which includes the conversation between Rask and myself:

No. 13129
AFFIDAVIT

That the facts set forth in the above Motion for Order Permitting Filing of Supplemental Complaint wherein W. R. McKelvy is shown representing the Macris and Continental Casualty Company in the Superior Court, King County, Washington first became

known by me on June 25 and 26, 1951, at which time I checked the records in the Clerk's office of said Court.

That the following is a copy of a memorandum made immediately after Mr. B. J. Rask left my office on or about March 8, 1951.

"B. J. Rask came to our office (Concrete Construction Co.) in Portland a couple of times and asked for me, but I was not in. He also phoned in a number of times and asked for me, but the book-keeper told him I was not in and suggested that he talk to Mr. Wheeler, so, after not being able to contact me for a number of times, he talked to Mr. Wheeler about wanting to handle our insurance and bonding business, saying that he could do us a lot of good and would like right then to come and talk it over, but Mr. Wheeler told him he had an appointment out of the office and that our outfit would not be in a position for a couple of months where we could go into general contracting. This man said, 'I'll call again in a few days'. So, he again called and told Mr. Wheeler that he was looking for organizations like ours that knew what they were doing and could perhaps help us to the needed money; that he wanted to come over and discuss the matter.

"They then set a time for March 8, 1951, at which time I was present. As this man came into the rear office with Mr. Wheeler, I greeted him and he pulled up a high stool and, pointing to the swivel chair and an ordinary chair, said, 'I'll take this; I always like to look down on my victim'. Mr. Wheeler told this man that we had carried our insurance and bonding business with the same outfit for a long time and that we were not in a financial position to get into general contracting; that a couple of contractors wanted us to join up with them, but we could not add much to the bonding capacity

of such an organization in view of the pending lawsuit. This man then said, 'Why, you have the equipment and organization that surely would help on that'. Mr. Wheeler said, 'But Mr. Schaefer wants to keep the equipment and property clear, at least until the suit is settled'. This man then turned to me and said, 'I think you should go up to see these fellows (Defendants below) and settle this out of court. Take what they give you and go on with your contracting business'. I said, 'I'm not contacting them. They know where I am. If they want to settle this thing, I'm agreeable to a settlement, but it will have to be substantial in amount.' He said, 'They will not contact you. You can see why. If you want to tell me, I'll see what I can do on it'. I said, 'No, we'll just let it ride as is'. He said, 'You can't win in a thing like this. The big boys have got this all buttoned up. They control the attorneys and the judges. Who do you think appoints the judges? The big money fellows do, of course.' He then told of a suit he was involved in in Montana and said, 'We had a solid case, but the copper companies had the Governor and all the judges in their back pocket. There are just so many technicalities that a layman can't hope to stand a chance. We didn't, and we had good attorneys on the job. The court will delay, they will switch judges and just anything. These judges are human like everybody else. They are bought off. They are appointed to a life job, but the fellows that get them appointed can depend on them to decide in their favor and they had better decide it as they are told. The little fellow just hasn't got a chance.' I said, 'Well, I don't know about that'. He said, 'They confuse the thing and drag it out for years and they will drag you through the mud so you will look like a criminal. Your reputation will be shot. They will dig up all of your past and, boy, you will just get worn out. It'll take years and you won't get anything out of it then.' I said, 'They can dig all they want to. I'm not afraid of anything

likethat.' He said, 'They will lie about you. You just can't get away from it. They just tell the judge what to do and he does it and if he doesn't want to, they will switch around until they get one that will. You just can't win. All these judges can be reached and the big boys have got the money. You'll be smeared, discredited and broke. The papers won't carry your story, but they will print any smear the other fellow wants to put out.' I said, 'I don't know about that. The Federal Judges have a life job. They don't need the money. Their job is based on honor. I think the wheels of justice will always grind exceedingly fine and things will work out O. K. in the end.' He said, 'You will never get anything like you expect out of it anyway'. I said, I think I will. That Yakima suit has cost me more than \$46,000.00 out of pocket money, plus the loss of money for all the years that we should have been in the general contracting business. My line, in the first place, is general contracting. Then I have four inventions that ought to be on the market right now and should have been for a number of years and I should be working on an automatic reader and a number of other inventions and some of these and perhaps including the automatic reader should be on the market now. It will take about \$60,000.00 to put the drill-in-tie on the market and at least another \$35,000.00 to develop the automatic reader. The other three inventions that should have been on the market a long time are a saw, a hammer and a drill-in-bolt. Those items do not require much money to get them onto the market, but I have not been able to raise enough money to get them through the patent office sooner. If they haven't damaged me to the extent of my claim, they haven't damaged me a dime.' He said, 'If I were you, I'd go up there and take what they gave me and come back and go to work. I wouldn't get too tough about this thing. I'd think of myself first and if you don't care, then I'd think of my family if I were you. Think it over.' "

That Mr. B. J. Rask has phoned my office more than nine times since March 8, 1951 and by very subtle language has reminded me of the impending fate if I persist in my present course. Mr. B. J. Rask has by flattery tried to induce Gale G. Wheeler to leave Concrete Construction Co. and go to work for Bitar Brothers (Empire Construction Co.) who I am informed and on information and belief allege are relatives of Mr. Rask and also very good friends of the Macris. Mr. B. J. Rask has also stated by phone to Gale G. Wheeler (to which conversation I was listening in on another phone, unknown to Rask) that the Macris are now big operators, and that they are now operating three or four different companies.

That I have made statements in the complaints and hearings to the effect that I have suffered serious monetary damage in the preparation and conduct of the litigation at Yakima, Washington, more fully set forth in the complaint herein, and that it has cost me in excess of \$46,000.00 to prosecute that suit, for which I have not received any reimbursement, and I now state that Mr. L. R. Hendershott, a Certified Public Accountant, who testified to the accounts in the Yakima case, has offered to testify to the amount of this damage. The judgment for \$1.00 rendered in my favor in connection with job specification #1068, which is the job in connection with which the malicious suit was filed against me in Portland, Oregon, has not been paid (see Exhibit N, page 463 of Transcript of Record, second paragraph).

M. C. SCHAEFER.

SUBSCRIBED and sworn to before me this 1st day of March, 1952.

GOLDADA W. TOOKE,
Notary Public for Oregon.
My Commission expires: 6/11/54.

To help you visualize the story outlined above and pleaded in my complaints, I have prepared a sketch graphically portraying the interlocking interests and the various actions of the parties. Copy of this graph is attached and by this reference made a part.

My damages briefly are the extra non-taxable costs in my Yakima suit, the costs of the defense of the wholly groundless suit in Portland, mental anguish as extreme, excruciating and protracted as can be imagined, plus loss of income from my concrete business (I was forced to rely on the personal credit of one of my employees in the amount of \$500.00 in order to exist at all), loss of income from being unable during all this period to pursue my regular business, that of being a general contractor in which field I can show earnings of very substantial amounts, and loss of income from being unable to perfect and market certain new inventions I have now patented, or on which I have patents pending.

Answering Continental Casualty Company's brief specifically so far as I read it, they say only two things, (1) that they merely appealed a close case in the usual course of business, and (2) that everything prior to the case at Yakima was only the act of an employee or

agent and the Corporation is not liable for acts of the agent.

A corporation can be held liable for damages in conspiracy on account of acts of its agents or employees. See 47 Am. Jur., p. 579, and *Hindman v. Bank* (CCA 6th) 98 F. 562; 139 Ind. 545; 194 Mass. 208; 50 W. Va. 611; 103 Wis. 125 and 17 Anno. Cases 102; 194 Mass. 208; 220 Ill. 355; 213 F. 526; 117 Tenn. 618; 27 R. I. 254; 79 N.W. 229; 33 A.L.R. 272; 4 B.R.C. 246. Furthermore see *Rich v. Daily Creamery Co.*, 296 Mich. 270, 296 N.W. 253; 134 A.L.R. 252, holding a corporation liable in civil conspiracy and setting up clear tests of the sufficiency of a pleading in conspiracy.

Neither McKelvy's nor the Macris' brief requires specific answer.

In general, the hearings to date and the briefs by Defendants talk about everything except this case. These Defendants misquote and misstate the facts and give a wholly erroneous picture of what happened. There is only one way to determine the merit of my appeal; i.e., after reading this reply brief, then read my complaints.

I propose to go more deeply into this matter at the hearing on April 9, unless you are fully satisfied from your reading of the record, but bear in mind that the principal actors in this drama are Continental Casualty Company and McKelvy & Skeel, using their confidential information and their high position for personal gain through such willing participants, though generally incompetent, as the Macris et al., and using every device

legal or extra-legal to crush legitimate operators if they cannot succeed in debasing them.

Respectfully submitted,

M. C. SCHAEFER, *Per Se.*

No. 13129

United States Court of Appeals
For the Ninth Circuit

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, W. R. McKELVY and
CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLEE
CONTINENTAL CASUALTY COMPANY

CARL E. CROSON

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Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

FILED

APR - 7 1952

PAUL P. O'BRIEN

United States Court of Appeals
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United States Court of Appeals
For the Ninth Circuit

M. C. SCHAEFER,

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SAM MACRI, DON MACRI, W. R. McKELVY and
CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLEE
CONTINENTAL CASUALTY COMPANY

JURISDICTION

Jurisdiction in the District Court was based on the facts alleged in Paragraph I of the Second Amended Complaint (Tr. 367-8) and upon 28 U.S.C. § 1332.

The District Court, having entered an Order dismissing the Second Amended Complaint with prejudice and without leave to amend, jurisdiction in the Court of Appeals is based on 28 U.S.C. § 1291, 1294.

STATEMENT OF THE CASE

1. Does Appellant's Second Amended Complaint state a cause of action against the Appellee, Continental Casualty Company, which is not barred by the applicable statute of limitations in the State of Washington?

2. Can Appellant state any cause of action?

3. If so, do the pleadings conform to Rule 8 of the Rules of Civil Procedure for the United States District Courts so as to withstand a Motion to Dismiss?

ARGUMENT

Summary

It is this Appellee's contention that the Second Amended Complaint does not state a cause of action against the Appellee, Continental Casualty Company; that if a cause of action is stated, it is barred by the applicable statute of limitations in the State of Washington; that Appellant cannot state a cause of action against this Appellee; that if a cause of action is stated, which is not barred by the statute of limitations, the Second Amended Complaint, as well as those which preceded it, is so verbose, prolix and redundant as to be subject to a Motion to Dismiss for failure to state a claim in simple, concise and direct terminology.

1. The Second Amended Complaint fails to state a cause of action against the Appellee, Continental Casualty Company.

(a) What cause of action is Appellant attempting to plead?

It appears from Paragraphs VI and VII of the Second Amended Complaint (Tr. 370-385) that the theory of Appellant's Second Amended Complaint is the recovery of damages for wrongs done by the named defendants pursuant to a civil conspiracy to injure appellant.

(b) What is a civil conspiracy?

It is the well established rule that the law of Washington controls the decision in this case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188. According to the law of the State of Washington, a civil conspiracy is a combination of two or more persons, acting in concert, to accomplish an unlawful purpose or some purpose not in itself unlawful, by unlawful means.

Dart v. McDonald, 107 Wash. 537, 182 Pac. 628;

Eyak River Packing Co. v. Huglen, 143 Wash. 229, 255 Pac. 123;

Kietz v. Gold Point Mines, Inc., 5 Wn.(2d) 224, 105 P.(2d) 71.

The vital elements of a civil conspiracy are:

- (1) a preconceived plan to accomplish the purpose,
- (2) common design to accomplish the purpose,
- (3) a meeting of the minds, or agreement, to accomplish the purpose,
- (4) an overt act, pursuant to the plan, to accomplish the purpose,
- (5) an unlawful purpose, or the use of unlawful means to accomplish it,
- (6) damage resulting from the overt acts of the conspirators.

In *Sobin v. Frederick*, 236 Mich. 501, 211 N.W. 71, we find an example of Element No. 1. In that case, plaintiff, owner of a candy store, gave a mortgage on his candy stock to defendant to secure a sale of candy.

The mortgagee later foreclosed his security. Plaintiff thereafter sued the mortgagee, the sheriff and the buyer at the sale for damages for alleged conspiracy. Said the Court, at page 74:

“There can be no ex post facto conspiracy to do that which has already been done. The root principle upon which the law of conspiracy rests is a preconceived plan to unlawfully work some public or private wrong or injury by concerted action, originating in combination, either carried out by joint action, or at least, pursuant to a joint arrangement and understanding.”

See also, *Ransom v. Matson Navigation Co.*, 1 F. Supp. 244, 246 (D.C., Wash.); *State of Mo. ex rel and to use of DeVault v. Fidelity and Casualty Co.*, 107 F. (2d) 343, 348.

In *U. S. v. American Column & Lumber Co.*, 263 Fed. 147, 151 (D.C., Tenn.) a prosecution for conspiracy to violate the Anti-Trust Act, the Court made the following comment on Elements No. 2 and No. 3:

“The first question arising is whether the defendants in associating themselves together under the so-called ‘open competition plan,’ thereby formed a combination or conspiracy. In other words, was there in the minds of two or more of the defendants a design to accomplish by and through the plan a common purpose? If so, there was a combination or conspiracy since a combination or conspiracy consists only in a mere meeting of the minds of two or more persons to accomplish a common purpose.”

To the same effect, see *Mox Inc. v. Woods*, 202 Cal. 676, 262 Pac. 302.

Wells v. Lloyd, 6 Cal. (2d) 70, 56 P.(2d) 517;
Ashby v. Peters, 128 Neb. 338, 258 N.W. 639,
 99 A.L.R. 843;

Burton v. Maupin, (Mo. App.) 281 S.W. 83;

Gerdes v. Reynolds, 30 N.Y.S.(2d) 755.

In the last cited case, the Court adds this warning, at page 89,

“ ‘The mere knowledge, acquiescence, or approval of the act, without cooperation, or agreement to cooperate, is not enough to constitute one a party to the conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.’ 12 C.J. 544.”

The Washington cases support the general rule cited above concerning common design and agreement. In *Dart v. McDonald*, *supra*, plaintiff sued defendant and wife for damages for a conspiracy to sell stock in a land development company. Defendant owned the land which he sold to the corporation for a much larger price than he paid for it. The business failed. Plaintiff was one of the unsuspecting stockholders. Defendant's wife held no stock in the corporation but plaintiff sought to hold her liable. Said the Court at page 540:

“Before Mrs. McDonald can be held liable it must be shown that she was a party to the conspiracy prior to the time the respondents subscribed for stock. It is unnecessary to cite authorities to the proposition that before a party can be held liable as a conspirator, the evidence must show that such a person entered into an agreement with the other conspirators to accomplish the object of the conspiracy.”

See also, *Kietz v. Gold Point Mines, Inc.*, *supra*, and *Dunlap v. Seattle National Bank*, 93 Wash. 568, 161 Pac. 364.

It is true, as stated in *Calcutt v. Gerig*, 271 Fed. 220, 222, (a case cited by Appellant) that

“It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts or circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention and purpose of the alleged conspirators to commit the same.”

Nevertheless,

“The mere statement that the parties conspired, or that there was a conspiracy is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise.” *Ransom v. Matson Navigation Co.*, *supra*, at page 246.

The fourth element is the overt act, without which there can be no conspiracy.

“The gravamen of a civil action for conspiracy is found in the overt act which results from the conspiracy and culminates in damage to the plaintiff.” *Park-in Theatres, Inc. v. Paramount-Richards Theatres*, 90 F. Supp. 727, 729 (D.C., Md.)

See also, *Moffett v. Commerce Trust Co.*, 75 F. Supp. 303 and *Mox Inc. v. Woods*, *supra*.

In this regard, the case of *Neustadt v. Employers Liability Assurance Corp. Ltd.*, 303 Mass. 303, 21 N.E.

(2d) 538 is worth noting. Plaintiff sought to enjoin three insurance companies from conspiring to take his automobile liability insurance business and in dealing with his customers directly. Demurrers were sustained, the Court saying, at page 540,

“But the effect of the charge that the defendants conspired together is to fix a joint liability on the defendants. The mere allegation that the defendants conspired with respect to the plaintiff, standing by itself does not constitute ground for civil relief. If there is no tort set out as to a single defendant, the charge of conspiracy adds nothing . . .”

The fifth element is well stated in *Kietz v. Gold Point Mines, Inc.*, *supra*, wherein the Court quoted from 15 C.J.S. Conspiracy, 998, § 3, at page 231 as follows:

“To constitute a conspiracy the purpose to be effected by it must be unlawful in its nature or in the means to be employed for its accomplishment, and, where the object in view is lawful and no unlawful means are used, there can be no civil action for conspiracy, even though defendants acted with malicious motives.”

Commenting on pleadings in a conspiracy action, the same Court said in *Dart v. McDonald*, *supra*, at page 543,

“It is true that it is not necessary, in order to establish the fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent only with the intent to defraud”

The sixth element concerns the damages suffered as

a proximate result of the acts of the conspirators. As was well stated in *Moffett v. Commerce Trust Co.*, *supra*, at page 304,

“... the gist or gravamen of the action is not the conspiracy itself, but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff.”

To the same effect, see *Park-in Theatres, Inc. v. Paramount-Richards Theatres*, *supra*; *Mox Inc. v. Woods*, *supra*.

(c) How to plead a cause of action for damages for conspiracy?

In *Patten v. Dennis*, 134 F.(2d) 137, the Court said that a cause of action does not consist of acts but of the unlawful violation of a right which the facts show. And in *Black & Yates Inc. v. Mahogany Association Inc.*, 129 F.(2d) 227, 231, the Court stated,

“A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment.”

(d) Does the Second Amended Complaint state a cause of action against Continental Casualty Co.?

Applying the legal rules stated above to the allegations of the Second Amended Complaint, it readily appears that Appellant has failed to state a cause of action against Continental Casualty Co.

Taking the Second Amended Complaint paragraph

by paragraph, Paragraph I (Tr. 367) refers solely to jurisdiction. Paragraph II (Tr. 368) is a general statement of the relationship between the parties. In this paragraph, Appellant alleges that Continental was in the bonding business, that Clyde Philp was one of its attorneys-in-fact, that Philp was a partner of Goerig, who together were joint venturers with the Macris, that the Macris had a contract on the Roza Irrigation project, that Appellant was a subcontractor on that job, that McKelvy was a member of the firm which acted as general counsel for Continental. Paragraph III (Tr. 369) recites that Continental bonded the Macris on the Roza job and that the bonds were signed by Philp. Paragraph IV (Tr. 369) spells out the joint venture between Philp & Goering and the Macris. Paragraph V (Tr. 370) alleges the date, March 14, 1944, on which Appellant signed the subcontract.

At the end of Paragraph V, it is apparent that Appellant is attempting to tie Continental with the Macris through the person of Clyde Philp, one of its attorneys-in-fact. The pure coincidence of this event is obvious. In addition, it should be noted that Philp's participation could in no way bind Continental to this joint venture, or to the acts of the joint venturers.

A case in point is *Ransom v. Dollar S.S. Line*, 2 F. Supp. 409 (D.C., Wash.) wherein plaintiff sued three steamship lines for damages for conspiracy. From the pleadings, it appeared that plaintiff was on board a Matson vessel headed for Honolulu when she was removed to a Nippon Line vessel and imprisoned there by officers of the Dollar Line. Later she was removed to a Dollar vessel and taken to Seattle where she was

jailed. Demurrers to the complaint were sustained. In the course of his opinion, Judge Neterer said, at page 410:

“It has been held that a corporation cannot, in contemplation of the common law, be guilty of conspiracy

“It may not be said that the employees of one company upon a ship may enter into a conspiracy with the employees of another ship or passenger agent of another ship for treatment of a passenger in the custody of the other ship and formulate a conspiracy of their several employers. Conspiracy is not within the scope of their employment The regular scope of employment is limited to conduct upon the ship and duties fairly incidental, and where it is sought to hold corporations beyond such employment and duties fairly incidental, it must be shown by affirmative acts of the corporation through its properly functioning agency.

“Malice or unlawful or fraudulent act is the gist of the action of conspiracy Malice may be said to be an intent from which flows any unlawful and injurious act committed without legal justification. It extends to evil designs or a corrupt or wicked motive against someone at the time of the act. And this must come from the corporation.”

From this ample quotation, it would appear that the mere fact that Philip, as attorney-in-fact for Continental, signed the Macri performance bonds could in no way commit Continental to any joint venture with the Macris. Thus the allegations which purport to tie Continental to the joint venture are without legal effect.

Paragraph VI (Tr. 370) is the crux of Appellant's

Second Amended Complaint. Appellant commences this Paragraph with the following words:

“That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff’s business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:”

These words standing alone do not set forth a conspiracy within the meaning of the legal rules already cited. In the first place, this particular set of words is subject to the criticism against legal conclusions stated in *Black & Yates Inc. v. Mahogany Association, Inc., supra*. To correct this obvious defect, Appellant then attempts to set forth a series of overt acts, numbered A through K (Tr. 370-384). Appellant fails however to correct his deficient pleading of a “preconceived plan” and agreement to injure Appellant. Not one fact is alleged in the entire complaint which complies with the rule of *Ransom v. Matson Navigation Co., supra*, which requires the stated conclusion to be predicated on “facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly

the unlawful enterprise.” Every attempt to set forth such facts is merely a statement of the same legal conclusion: “in furtherance of said conspiracy” (Tr. 370, 371, 378, 379, 381, 383 (2)) or words of similar import: “became a co-conspirator” (Tr. 372) “in concert with the other defendants” (Tr. 378). Such conclusions do not comply with the rules cited. Nowhere has Appellant pleaded facts which show a “common design.” “a preconceived plan,” or “a meeting of the minds, or agreement” to accomplish the alleged purpose. For this reason alone, the Second Amended Complaint does not state facts sufficient to constitute a cause of action against Continental.

From elements No. 4 and No. 5, we know that Appellant must allege overt acts against Appellant which must be torts or which must result in an unlawful purpose. None of the eleven so-called tortious acts related by Appellant are in fact torts. In Paragraph VI-A (Tr. 370) Appellant sets out the Macris’ breach of contract on the Roza project. A breach of contract is not a tort. The allegation that the breach by the Macris was participated in by Continental is a nullity as already shown. Since Philp’s only contact with Continental was as attorney-in-fact, he could not bind Continental to Macri in such status. In Paragraph VI-B (Tr. 371), Appellant sets out the termination of the joint venture. Surely this is not a tort. In Paragraph VI-C (Tr. 372-375) Appellant relates the employment of the Appellee McKelvy to sue Macri and Continental, the bonding company. This paragraph merely recites the history of dealings between Schaefer and McKelvy and shows no overt act or tort. In Paragraph VI-D (Tr. 375-378), Appellant sets out his grievances against

McKelvy, including his discovery that McKelvy's firm had represented Continental. The wrong alleged here, if any, is again a breach of contract, this time between attorney and client. In Paragraph VI-E (Tr. 378) Appellant relates his hiring of new counsel, and full disclosure of all the facts in the suit against the Macris. No overt acts of any nature are charged. In Paragraph VI-F (Tr. 379), Appellant alleges the suit filed by the Macris in Oregon against Appellant. No reference is made to Continental. This Appellee contends that these facts do not set forth any tort.

In *Puget Sound P. & L. Co. v. Asia*, 2 F.(2d) 491 (D.C., Wash.) plaintiff sought to enjoin the defendants from conspiring to force a breach of contract between the plaintiff and the City of Seattle by a suit against the city. A motion to dismiss was granted. Regarding the suit, the Court said, at page 492,

"The only act charged against defendant is the bringing of an action in the State Court, a Court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue . . . and having a right to sue the law does not inquire into the motives.

"A court will not presume that a court of competent jurisdiction will permit itself to be made the instrumentality, through which an unlawful purpose may be accomplished."

Further, the law of both Oregon and Washington requires, in order to establish a tort of malicious prosecution, that there be an arrest of the person or seizure of property.

Manhattan Quality Clothes v. Cable, 154
Wash. 654, 283 Pac. 460;

Hoffman v. Kummel, 142 Ore. 397, 20 P.(2d)
393.

No such facts are alleged. Therefore, this paragraph shows no overt act.

In Paragraph VI-G (Tr. 379-381) Appellant sets out the commencement of his suit in Yakima. In this paragraph, he seeks to make something out of the fact that Continental advised his attorney that Philp and Goerig were parties to the contract and hence liable thereunder. Obviously, there would have been no point in notifying Appellant of this fact until suit was instituted. Prior knowledge would not have affected Appellant in any way. Appellant thereafter relates his victory against all the defendants in both his Yakima suit and on the cross-complaint of the Macris which was the foundation of the earlier Oregon suit. No overt acts are here alleged.

In Paragraph VI-H (Tr. 381-383), Appellant notes the progress of his case from the trial court to the Supreme Court of the United States. He seeks to plead overt acts of a tortious nature in applications for new trial, appeal to the Circuit Court of Appeals and *certiorari* to the Supreme Court, in none of which were any of the defendants successful. How the full and complete defense of this suit by Continental could be considered tortious is beyond reason. From Appellant's Exhibit M (Tr. 438-461) attached to the Second Amended Complaint, we can easily discover Judge Driver's feelings about this case which Continental is

accused of defending. Judge Driver who tried the Yakima case, said, "Now, coming to the law applicable to this situation, it is of course difficult . . ." (Tr. 445); ". . . and as I read the cases while there is none that is squarely in point . . ." (Tr. 446); ". . . this is a close case, and the questions are close and in some respects novel ones; and if the Appellate Court should hold . . ." (Tr. 455); "Well, I know it is a close and difficult question . . ." (Tr. 459). These very statements of the trial court show both a justification for defense and an anticipation of appeal. These statements were amplified by Judge Driver at the time of the hearing on the first Amended Complaint when he said: "It was a very complex series of cases . . ." (Tr. 337); "Here's a case that was a very close and difficult one, I think." (Tr. 338); "I thought the chances were not much more than even." (Tr. 338); "I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close." (Tr. 339). From these statements, we can see no overt act alleged in Paragraph VI-H.

In Paragraph VI-I (Tr. 383) Appellant seeks to make an overt act out of the refusal of Continental to delete words from its release and from the fact that its co-defendants have not paid their judgments to Continental. In fact, the words were deleted. No tort can be deduced from these allegations.

In Paragraph VI-J (Tr. 383-384), Appellant alleges an attempt by McKelvy to collect a bill for services. This is not a tort. In Paragraph VI-K (Tr. 384) Appellant states that he was unable to get his attorney to sue McKelvy. This is not a tort.

The last paragraph (VII) (Tr. 384-385) deals solely with damages, repeating again the legal conclusions regarding conspiracy.

In summary, it appears that none of the eleven alleged tortious acts are, in fact, torts. Hence, in order to state a cause of action, Appellant must show that the purpose itself was unlawful. Here, Appellant fails, because he has not met the requirement of pleading facts which show a "common design," "preconceived plan" or "meeting of the minds." The intent of one of the defendants alone to injure Appellant is not a fact which creates a conspiracy. It requires the cooperation and confederation of two or more of the defendants. Without this, the Appellant has failed to show injury as a result of a conspiracy.

Briefly stated the only overt "acts" alleged are as follows:

- (1) breach of contract by Macri (Tr. 370)
- (2) breach of attorney-client contract by McKelvy (Tr. 372-378)
- (3) Macri suit in Oregon (Tr. 379)
- (4) defense of Schaefer suit in Yakima (Tr. 379-381)
- (5) appeals by defendants (Tr. 381-383)

The termination of the joint venture (Tr. 371), the hiring of new counsel (Tr. 378), the deletion of certain words from the bonding company release (Tr. 383), the inability of McKelvy to collect his bill for services (Tr. 383-4), and the inability of Schaefer to get Olson to bring this suit (Tr. 384) are certainly not overt acts.

The Second Amended Complaint shows that Appellant recovered damages for the Macri breach of con-

tract (Tr. 380) and against the Macris on their cross-complaint which was the basis of the Oregon suit (Tr. 381). The Complaint also shows that McKelvy did not prevent Appellant from bringing his suit (Tr. 378). The Complaint also shows that Appellant recovered judgment against Continental, and his costs, all of which were paid (Tr. 380, 383).

Thus, it would appear that, in fact, Appellant suffered no damage as a result of any of the five so-called overt acts. His grievance appears to be one which goes to the expense of conducting a law suit. This same observation was made by Judge Driver in the hearing on the first Amended Complaint when he said at page 339 of the Transcript:

“You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It’s a queer situation. I think perhaps you’ve come to the realization which many litigants don’t, that litigation necessarily and unfortunately is expensive, and that it isn’t as profitable even for the winner as is sometimes thought.”

It goes without citation that only certain costs of waging a law suit are recoverable. Appellant has been paid these taxable costs. Now he seeks to recover from the losers non-taxable costs in the form of damages. Actually his damages consist of attorneys’ fees and other non-taxable court costs, loss of time and profit because unable to conduct his business in the usual course while attending and preparing a law suit, and the other necessary expenses in connection therewith. These are not damages which are the proximate result of a conspiracy.

For these reasons, this Appellee contends that no cause of action has been started against Continental Casualty Co.

2. If any cause of action is stated, it is barred by the Statute of Limitation.

Appellant filed his original Complaint on December 1, 1950 (Tr. 12). Service was made on this Appellee some days later. The statutes of limitations of the State of Washington govern the decision herein. *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.*, 1 F. Supp. 576. In Washington, the Statute of Limitations continues to run until the Complaint has been both served and filed. Since there are so few days involved, let us take December 1, 1950, as the cut-off date.

In Washington there are only two possible statutes which are applicable to this case. One is Rem. Rev. Stat. § 159 providing for a three-year limitation on certain actions. The other is Rem. Rev. Stat. § 165 which provides:

“An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.”

The latter statute applies to conspiracy actions. In *Mitchell v. Greenough*, 100 F.(2d) 184, a case decided on the basis of Washington law, it was agreed by all parties that the two-year statute governed. In support of this case is *State v. Erickson*, 54 Wash. 472, 103 Pac. 796, which was a trial and conviction of the crime of conspiracy to control milk prices. Defendant, during the trial, moved to dismiss the charges on the ground that the conspiracy had ended more than two years

before the information was filed. In response the Court said, at page 477,

“It is true that a prior and unsuccessful attempt had been made, but the evidence very clearly shows that there was a renewed agreement and organization which was made within one year prior to the filing of the information. This was the one upon which the present charge was based. The information was therefore filed within time.”

The next question to determine is when the cause of action for damages for conspiracy accrues. One of the clearest answers to this question is found in *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.*, 73 F.(2d) 333, 335, 97 A.L.R. 133.

“In the instant case there are no overt acts alleged to have been committed within one year prior to the filing of the action. In *Nolle v. Oyster*, 230 U.S. 165 at page 182, 33 S.Ct. 1043, 57 L.ed. 1439, it was said to be a well-settled rule that no civil action will lie for a conspiracy unless there be an overt act that results in damage to the plaintiff. A necessary corollary to this rule would seem to be that, when there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run. If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficial purpose of the statute to fix a period to the right to sue would be defeated.”

On the basis of this authority, it must next be determined whether there was an overt act committed in furtherance of the alleged conspiracy within the pe-

riod of two years from December 1, 1948, to December 1, 1950.

Working backwards in Appellant's Second Amended Complaint, the latest date alleged is October 4, 1950 (Tr. 384) at which time Appellant's attorney, Olson, refused to take the present suit. Olson is not a party to this action, hence his refusal could not be an overt act of these alleged conspirators. The next date is August 18, 1950 (Tr. 383) when Appellant searched Olson's files for correspondence allegedly written by McKelvy advising Olson about the nature of the action to be brought (Tr. 384). If the letters were written, they would not be in aid of an alleged conspiracy, and if they were not written, the failure to do so could not be an overt act by McKelvy since his employment had been terminated October 20, 1945 (Tr. 377), and he would be under no duty to act. The next date alleged is August 16, 1950 (Tr. 383) when McKelvy attempted to collect his bill for services from Appellant. Since McKelvy did not collect his bill on this date, there would seem to be no overt act.

The next date takes us back to November 9, 1949 (Tr. 383) when Continental paid the judgment. Appellant claims an overt act in the refusal of Continental to delete certain words from its release. The fact remains, however, that the words were deleted; so again, no overt act.

There follows a series of dates regarding the appeal from the decision in the Yakima District Court. Since it is not presumed that the Courts were a party to the conspiracy, the dates of decisions will be ignored and

only the dates of acts by the defendants considered. They follow in reverse chronological order:

- June 20, 1949—Macri petition for Writ of Certiorari to Supreme Court (Tr. 382);
- May 14, 1949—Continental petition for Writ of Certiorari to Supreme Court (Tr. 382);
- March 10, 1949—Macri petition for rehearing of Circuit Court Decision (Tr. 382);
- March 7, 1949—Continental petition for rehearing of Circuit Court Decision (Tr. 382);
- August 18, 1947—Macri notice of appeal (Tr. 381);
- July 29, 1947—Philp & Goerig notice of appeal (Tr. 381);
- May 20, 1947—Continental notice of appeal (Tr. 381);
- May 9, 1947—Continental motion for new trial (Tr. 381).

This series of dates not only takes us beyond the two-year Statute of Limitations, but also beyond the three-year Statute. Since they are all related acts, they shall be discussed together and the importance of argument over the applicable statute of limitations diminishes.

Is it a tortious act to ask for a new trial, appeal from a decision of a trial court, petition for rehearing or seek a Writ of Certiorari in a case that the trial court describes as “close,” “difficult,” and “complex,” and where the chance of victory is “not much more than even,” and where the trial court anticipates that an appeal will follow? (See quotations, *supra*.) Certainly it is no tort. While these acts may be overt in the sense

that something was done, there is nothing, inferential or circumstantial, that indicates that these legal steps were taken pursuant to a preconceived plan, common design or agreement of the parties. Hence, this Appellee contends that there were no overt acts in pursuance of a conspiracy which occurred within a period of three years before December 1, 1950, and that for this reason the cause of action is barred by any and all statutes of limitations without regard to whether the three- or two-year statute applies.

There are no dates alleged in the complaint, later than those heretofore mentioned. No further consideration of the pleadings are necessary for this point in the argument.

3. The District Court did not err in dismissing the Second Amended Complaint without leave to amend.

The Second Amended Complaint was dismissed with prejudice and without leave to amend (Tr. 532-534). The dismissal should be affirmed where the averments of the Complaint show that the plaintiff cannot state a cause of action upon which he can recover.

Gromacki v. Armour & Co., 76 F. Supp. 752.

Appellant's original Complaint takes up 9½ pages of the Transcript (Tr. 3-12). Motions to Dismiss were heard before the Hon. Dal M. Lemmon who consumed considerable time in advising Appellant on the proper manner of pleading his cause of action (Tr. 214-262). Appellant's first Amended Complaint takes up 141 pages of the Transcript (Tr. 42-182). In it, Appellant virtually tries his entire case, setting forth almost all

the evidence in his possession. The Motions to Dismiss this Complaint were heard before the Hon. Sam M. Driver who likewise spent considerable time in advising Appellant on the proper facts to plead to make his complaint safe against motions to dismiss (Tr. 279-360). The Second Amended Complaint takes up 17½ pages of the Transcript and has an additional 112 pages of Exhibits (Tr. 386-498). It is virtually the same as the first Amended Complaint except as to form. (See Analysis, Tr. 528-531.) At the time of the hearing of the Motions to Dismiss this Complaint, Appellant also sought to file a paper denominated "Supplemental Complaint" (Tr. 516-518). By stipulation of all parties, the facts raised in this paper were to be considered in passing on the Motions to Dismiss (Tr. 563). The additional facts related therein seek to further prove McKelvy's representation of Continental on other occasions, and seek to add one B. J. Rask as a conspirator. All of the allegations regarding McKelvy and Continental are matters of evidence and are not material facts. The additional party is in no way associated with the other alleged conspirators by any fact or inference except the usual legal conclusion.

Considering the voluminous detail in these three complaints and the "supplemental complaint," all of which was before the Hon. William T. Lindberg in the hearing on the Motion to Dismiss the Second Amended Complaint (Tr. 555-636), and considering further the advice given to Appellant by Judges Lemmon and Driver, it would appear that Appellant has stated all of the facts which may bear on the matter in controversy and that under no possible statement of the facts,

can he allege a cause of action. For this reason, the District Court did not err in its order dismissing with prejudice and without leave to amend. In fact, this order was made final at the request of Appellant, as well as Appellees (Tr. 610).

4. The Second Amended Complaint does not conform to the Rules of Civil Procedure.

Without waiving any of the foregoing grounds for affirmance, but in the event the Court should find that Appellant has stated facts sufficient to state a claim for relief which claim is not barred by the statutes of limitations, then in that event, the Second Amended Complaint should still be dismissed for failure to comply with the Rules of Civil Procedure.

Rule 8 (a) requires a "short and plain statement of the claim." Rule 8 (e) (1) requires that "each averment of a pleading . . . be simple, concise and direct." The objection that a Complaint is verbose, redundant and prolix in violation of this Rule is properly taken by a Motion to Dismiss.

Capdeville v. Am. Commercial Alcohol Corp.,
1 F.R.D. 365;

Buckley v. Music Corp. of America, 1 F.R.D.
603.

Appellant's Second Amended Complaint is verbose, redundant and prolix and subject to a Motion to Dismiss. By separating his Exhibits from the main body of the Complaint, Appellant has in no way changed the allegations of the Second Amended Complaint from those of the first Amended Complaint. Judge Driver

dismissed the latter for prolixity (Tr. 365-367). If the Second Amended Complaint is not to be dismissed without leave to amend, then it should still be dismissed for the same reasons as those stated in Judge Driver's opinion.

This Appellee asserts, however, that under no possible state of facts can Appellant state a claim for relief which is not barred by the statutes of limitations and urges an affirmance of the lower court's ruling, dismissing the Second Amended Complaint with prejudice and without leave to amend, in conformance with the decision in *J. W. Terteling & Sons. v. Central Neb. Public Power & Irrigation District*, 8 F.R.D. 210, 212, where the court said:

“As against a motion to dismiss for want of adequate statement of claim, a plaintiff is entitled to a liberal construction of his complaint, which should be construed in the light most favorable to the claimant with all doubts resolved in his favor. And the Complaint is not to be dismissed upon that ground, unless ‘it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts, which could be proved in support of the claim asserted by him’.”

See also, *Jefferson Hotel Co. v. Jefferson Standard Life Ins. Co.*, 7 F.R.D. 722 and *Kansas-Neb. Natural Gas Co. v. City of Hastings, Neb.*, 10 F.R.D. 280.

We contend as stated in *J. W. Terteling & Sons v. Central Neb. Public Power & Irrigation District*, *supra*, that “it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts, which could be proved in support of the claim

asserted by him'' and that if any facts could be proved, they would be barred by the statutes of limitations. In the event this Court finds to the contrary, we contend that the Second Amended Complaint is still subject to a Motion to Dismiss for failure to conform to Rule 8 (a) and 8 (e) (1) and for this reason, the lower court's decision should be affirmed.

Respectfully submitted,

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No. 13130

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP
LINE, a Corporation; THE ROBERT DOL-
LAR CO., a Corporation; H. M. LORBER,
AMERICAN PRESIDENT LINES, LTD., a
Corporation; WELLS FARGO BANK &
UNION TRUST COMPANY, a Corporation;
JOSEPH A. TOGNETTI and THE ANGLO
CALIFORNIA NATIONAL BANK OF SAN
FRANCISCO, a National Banking Association,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FEB 12 1952

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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will of Gustav Epstein, deceased.

In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 30,407

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., H. M. LORBER, AMERICAN PRESIDENT LINES, LTD., WELLS FARGO BANK AND UNION TRUST COMPANY, JOSEPH A. TOGNETTI, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

Defendants.

COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY, DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, DAMAGES AND OTHER RELIEF

To the Honorable Judges of said Court:

Comes now the United States of America, plaintiff, by its attorneys, and under direction and by authority of the Attorney General of the United States complains of the defendants as follows:

1. This Court has jurisdiction of this action under 28 U.S.C. 1345 and under 28 U.S.C. 2201.
2. Plaintiff the United States of America is a sovereign body politic.
3. Each of the defendants R. Stanley Dollar and

H. M. Lorber is a citizen and resident of the State of California and of the Northern Judicial District of California.

4. Defendants Dollar Steamship Line and The Robert Dollar Co. are each corporations organized and existing under the laws of the State of California and each is incorporated in and is doing business in the Northern Judicial District of California. The principal place of business of Dollar Steamship Line is at 311 California Street, San Francisco, California. The principal place of business of The Robert Dollar Co. is at 311 California Street, San Francisco, California. Defendants R. Stanley Dollar, H. M. Lorber, Dollar Steamship Line and The Robert Dollar Co. are hereafter collectively referred to as the Dollar defendants.

5. Defendant American President Lines, Ltd. is a corporation organized and existing under the laws of the State of Delaware, is doing business in the Northern Judicial District of California, and has its principal place of business in California at 311 California Street, San Francisco, California.

6. Defendant Wells Fargo Bank and Union Trust Company is a corporation organized and existing under the laws of the State of California, is incorporated in and is doing business in the Northern Judicial District of California, and has its principal place of business at Market and Montgomery Streets, San Francisco, California.

7. Defendant Joseph A. Tognetti is a citizen and resident of the State of California and of the North-

ern Judicial District of California, residing at 4638 Anza Street, San Francisco, California.

8. Defendant The Anglo California National Bank of San Francisco is a national banking association organized and existing under the laws of the United States, is doing business in the Northern Judicial District of California, and has its principal place of business at 1 Sansome Street, San Francisco, California.

9. Plaintiff is the true and lawful owner of 100,145 shares of the Class A stock and of 2,100,000 shares of the Class B stock of defendant American President Lines, Ltd., and of certificates representing said shares numbered BX-26, BX-27, BX-28, AX-10 (issued by American President Lines, Ltd. under its then corporate name, Dollar Steamship Lines, Inc., Ltd.), and A-150 (issued by American President Lines, Ltd. under its present corporate name). Certificate A-150 also represents 13,133 shares of Class A stock not involved in this action. Said shares and certificates constitute approximately 92% of the voting stock of defendant American President Lines, Ltd. Plaintiff acquired absolute legal and equitable title to said shares and the certificates representing them (subject only to the then existing rights of defendant Anglo California National Bank of San Francisco as pledgee of certain of said shares) pursuant to a written agreement dated August 15, 1938 entered into between defendant American President Lines, Ltd. (in its then corporate name of Dollar Steamship Lines, Inc., Ltd.), the Dollar defendants, defendant Anglo California

National Bank of San Francisco, and the United States Maritime Commission (then an agency of the United States Government), as well as certain other parties. A copy of said agreement is attached to this complaint as Exhibit A. Pursuant to the terms of said agreement defendants Dollar Steamship Line, R. Stanley Dollar and H. M. Lorber and J. Harold Dollar Estate (the predecessor in interest of defendant The Robert Dollar Co. with respect to certain of said shares), endorsed in blank certificates representing said shares and delivered them to a representative of the United States Maritime Commission. The true intent and legal result of the transfer of said certificates was to vest in plaintiff all the right, title and interest, legal and equitable, of the transferors in and to said shares and certificates. Thereafter plaintiff caused defendant American President Lines, Ltd. to issue to it, in the name of United States Maritime Commission, new certificates numbered BX-26, BX-27, BX-28, AX-10, and A-150 representing said shares.

10. On March 12, 1951, the United States Supreme Court denied the petition for writs of certiorari filed by Charles Sawyer, Secretary of Commerce, and Emory S. Land, et al. (No. 552, Oct. Term, 1950) to review a judgment entered January 31, 1951 by the United States Court of Appeals for the District of Columbia Circuit directing the United States District Court for the District of Columbia to enter a judgment in the case of R. Stanley Dollar, et al v. Emory S. Land, et al., Civil Action No. 31468, granting the Dollar defendants

possession of said certificates. A copy of the judgment and opinion of the United States Court of Appeals for the District of Columbia, entered January 31, 1951, is attached hereto as Exhibit B. Plaintiff alleges upon information and belief that a judgment in the form directed by the United States Court of Appeals for the District of Columbia Circuit will be entered in the immediate future by the United States District Court for the District of Columbia and that the Dollar defendants will thereupon immediately take all possible steps to enforce said judgment, including the issuance of a writ of assistance to compel Charles Sawyer, Secretary of Commerce, to deliver possession of said certificates to the Dollar defendants. If said certificates thereby come into possession of the Dollar defendants, the delivery of said certificates to them by said Charles Sawyer will not be a voluntary act on his part, nor an act by him in his official capacity representing plaintiff. On the contrary, such delivery will be by Charles Sawyer only in his individual capacity, without authority from plaintiff, and only under the compulsion of said judgment of the United States District Court for the District of Columbia. Plaintiff alleges upon information and belief that whether or not the Dollar defendants come into actual possession of said certificates by virtue of said judgment, they will persist in their demands (as alleged in paragraphs 13 and 14 of this complaint) upon defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco that said defendants recognize

them (the Dollar defendants) as the owners of said shares and certificates and that they issue to the Dollar defendants new certificates evidencing their asserted ownership of said shares and their asserted right to the control of defendant American President Lines, Ltd., its management, property and affairs, and that they register the Dollar defendants on the books of defendant American President Lines, Ltd. as the owner of said shares.

11. Plaintiff was not a party to said action in the United States District Court for the District of Columbia and is not bound or concluded by said judgment or any proceedings taken for the enforcement thereof. Said judgment has not divested plaintiff of its title to or right to possession of said shares and certificates.

12. The Dollar defendants now wrongfully claim to be the owners of said shares and certificates, although at the time of the transfer of said certificates to plaintiff in 1938 and for some years thereafter said Dollar defendants represented and admitted that they had transferred to plaintiff all their right, title and interest in and to said shares and certificates. The numbers of shares now wrongfully claimed by the respective Dollar defendants are: Defendant Dollar Steamship Line: 2,100,000 shares of B stock and 2,075 shares of A stock; defendant R. Stanley Dollar: 51,174 shares of A stock; defendant H. M. Lorber: 9,174 shares of A stock; and defendant The Robert Dollar Co.: 37,722 shares of A stock.

13. The Dollar defendants have, since December 16, 1950, made demands on defendant American

President Lines, Ltd. and its directors and officers to recognize them (the Dollar defendants) as the owners of said shares and certificates and to cause to be issued to the Dollar defendants new certificates evidencing their asserted ownership of said shares and their asserted right to the control of defendant American President Lines, Ltd., its management, property and affairs, and to cause the Dollar defendants to be registered on the books of defendant American President Lines, Ltd. as the owners of said shares. Attached hereto as Exhibits C and D are copies of such written demands dated December 16, 1950 and February 7, 1951, respectively.

14. Defendant Wells Fargo Bank and Union Trust Company is the transfer agent of the issued Class A stock of defendant American President Lines, Ltd. Defendant Joseph A. Tognetti is the transfer agent of the issued Class B stock of defendant American President Lines, Ltd. Defendant The Anglo California National Bank of San Francisco is the registrar of the Class A stock of American President Lines, Ltd. Plaintiff alleges on information and belief that the Dollar defendants have made demands on said defendants Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco, identical or similar in purport to Exhibits C and D.

15. Plaintiff, as the true and lawful owner of said shares and certificates, has since December 12, 1950 served written notices upon defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The

Anglo California National Bank of San Francisco that it continues to be the true and lawful owner of said shares and certificates notwithstanding any judgments or proceedings in said action No. 31468 in the United States District Court for the District of Columbia and that said defendants will act at their peril and will be held accountable to plaintiff for any action they may take in derogation of plaintiff's title to said stock. Attached as Exhibits E and F are copies of such notices to defendant American President Lines, Ltd., dated December 18, 1950, and January 31, 1951. Attached as Exhibits G, H, I, J, K, and L are copies of such notices to defendant Wells Fargo Bank and Union Trust Company or its counsel dated December 12, December 15, December 18 and December 19, 1950, and January 31, 1951, respectively. Attached as Exhibit M is a copy of a notice by plaintiff served on defendant Wells Fargo Bank and Union Trust Company on January 18, 1951, by the United States Marshal for the Northern District of California, and the marshal's return of service. Attached as Exhibits N and O are copies of such notices to defendant Joseph A. Tognetti dated December 12 and 15, 1950, respectively. Exhibits E and F were also directed to defendant Joseph A. Tognetti. Attached as Exhibit P is a copy of a notice by plaintiff served on defendant Joseph A. Tognetti on January 18, 1951, by the United States Marshal for the Northern District of California, and the marshal's return of service. Attached as Exhibits Q and R are copies of such notices to defendant The Anglo California

National Bank of San Francisco dated December 18, 1950 and January 31, 1951.

16. Said shares of stock have a special, unique and peculiar value so that a suit at law for damages is inadequate. In particular, as alleged in paragraph 21 of this complaint, if the Dollar defendants should by virtue of said judgment about to be entered by the United States District Court for the District of Columbia, and by virtue of their demands upon defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti and The Anglo California National Bank of San Francisco, obtain control of the affairs and management of defendant American President Lines, Ltd. even temporarily, irreparable injury would be caused to defendant American President Lines, Ltd. and to plaintiff as owner of the large majority of its common stock. Exhibits A through R above referred to are hereby made a part of this complaint.

17. Plaintiff has made demand upon the Dollar defendants that they refrain from claiming to be the owners of said stock and said certificates and refrain from making said demands upon defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco, but the Dollar defendants have refused to do so.

18. The wrongful claim by the Dollar defendants of ownership of said shares and certificates and their wrongful demands upon defendants American

President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco depreciate the value of plaintiff's title and property rights in and to said shares and certificates, prevent plaintiff from selling said shares and certificates, and constitute a cloud upon plaintiff's title to said shares and certificates, all to the irreparable injury of plaintiff.

19. Plaintiff alleges on information and belief that defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco will, because of the Dollars defendants' claim of title to said shares and certificates, unless restrained by order or judgment of this Honorable Court, yield to the demands made upon them by the Dollar defendants, will recognize the Dollar defendants as the true and lawful owners of said shares and certificates, and will cause new certificates to be issued to the Dollar defendants as owners of said shares, all to the irreparable injury of plaintiff.

20. There exists between plaintiff and all defendants a present, actual controversy as to whether plaintiff or the Dollar defendants have valid title to and the lawful right to possession of said shares and certificates and the rights as to control and management of defendant American President Lines, Ltd. appurtenant thereto.

21. Defendant American President Lines, Ltd. is an important and integral unit in the American Merchant Marine. In the light of the present in-

ternational crisis it is of vital importance to the public welfare of the United States that there be not even a temporary interference with, or diminution in, the efficiency of defendant American President Lines' trans-pacific and around-the-world service. The Dollar defendants will, unless restrained by this honorable Court, immediately take all possible steps to take over the control, management and operation of defendant American President Lines, Ltd. Plaintiff alleges on information and belief that any such control of American President Lines, Ltd. by the Dollar defendants, even if only temporary, would have a seriously detrimental effect upon the efficient operation of defendant American President Lines, Ltd., with consequent irreparable injury to plaintiff and to the public welfare. During the years prior to 1938 when the Dollar defendants controlled and managed American President Lines, Ltd. (the corporate name of which was then Dollar Steamship Lines, Inc., Ltd.), their management of said company was highly inefficient and improvident. They caused excessive salaries, commissions and management fees to be paid by defendant American President Lines, Ltd. to themselves or to affiliated corporations which they controlled. As a result of such mismanagement by the Dollar defendants, defendant American President Lines, Ltd. was reduced to a precarious financial condition and by 1938 was on the verge of bankruptcy. Since the transfer to plaintiff of said shares and certificates pursuant to the agreement of August 15, 1938, defendant American President

Lines, Ltd. has been restored to a prosperous financial and sound operating condition, as the result of loans by plaintiff to defendant American President Lines, Ltd. in aggregate principal amounts of \$4,500,000 and the installation by plaintiff of competent and efficient management and personnel.

Wherefore, plaintiff prays for relief as follows:

1. That plaintiff may have such preliminary, interlocutory relief as may be necessary and proper.

2. That a permanent injunction be issued against defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber restraining each of them, their officers, agents, servants, employees, and attorneys from exercising or attempting to exercise any rights or privileges as owners of stock certificates BX-26, BX-27, BX-28, AX-10, A-150 and the shares of stock represented thereby consisting of 100,145 shares of Class A stock and 2,100,000 shares of Class B stock of defendant American President Lines, Ltd., including the making of any demands upon defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti and The Anglo California National Bank of San Francisco, that new certificates of stock of defendant American President Lines, Ltd. be issued to defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber, or that they be registered as the owners of the shares of stock represented by certificates numbered BX-26, BX-27, BX-28, AX-10 and A-150.

3. That a permanent injunction be issued against defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco, their respective officers, agents, servants, employees, and attorneys, restraining them from issuing any new certificates of stock of defendant American President Lines, Ltd. to defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber; from registering or recording defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, as owners of any of the shares of Class A or Class B stock of defendant American President Lines, Ltd. now represented by certificates No. BX-26, BX-27, BX-28, AX-10, and A-150; and from in any way recognizing said defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, as the lawful owners of said shares of stock or said certificates.

4. That it be adjudged and decreed that plaintiff is the true and lawful owner of 100,145 shares of Class A stock and of 2,100,000 shares of Class B stock of defendant American President Lines, Ltd. and of certificates numbered BX-26, BX-27, BX-28, AX-10, and A-150 representing said shares; that plaintiff is vested with absolute legal and equitable title to and the right to possession of said shares and certificates; that defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and

H. M. Lorber have no right, title or interest, legal or equitable, in and to said shares or certificates, and have no right to possession thereof; that in the event said defendants shall come into possession of said stock certificates, that they be directed and ordered by this Court to deliver said stock certificates to the plaintiff.

5. That plaintiff recover damages from defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber for the cloud on plaintiff's title to stock certificates No. BX-26, BX-27, BX-28, AX-10, and A-150, and the shares represented thereby, resulting from the wrongful claims by said defendants to be the owners of said shares and certificates.

6. That plaintiff have such other and further relief as may be just and proper, together with its costs.

/s/ NEWELL A. CLAPP,
Acting Assistant Attorney General

/s/ EDWARD H. HICKEY,
Attorney, Department of Justice

/s/ DONALD B. MacGUINEAS,
Attorney, Department of Justice

/s/ PHILIP H. ANGELL,
Special Assistant to the Attorney
General,
Attorneys for Plaintiff.

Duly Verified.

EXHIBIT A

This agreement dated August 15, 1938, by and between:

Dollar Steamship Lines, Inc., Ltd., a Delaware corporation, hereinafter referred to as Dollar of Delaware;

Dollar Steamship Line, a California corporation, hereinafter referred to as Dollar of California;

The Robert Dollar Co., a California corporation, hereinafter referred to as Robert Dollar Co.;

Admiral Oriental Line, a Washington corporation, hereinafter referred to as Admiral Oriental;

Pacific Lighterage Corporation, a Marine corporation;

Olympic Refining Company, a Washington corporation;

Dollar Wharf & Warehouse Company, a China Trade Act corporation;

Dollar Terminal Steamship Company, a Nevada corporation;

R. Stanley Dollar;

Keith R. Ferguson and Robert Dollar II, as executors of the estate of John Harold Dollar, also known as J. Harold Dollar, deceased;

H. M. Lorber;

The Anglo California National Bank of San Francisco, a national bank corporation, hereinafter referred to as Anglo Bank;

Mortimer Fleishhacker;

Herbert Fleishhacker; and

United States Maritime Commission, hereinafter referred to as the Commission;

Exhibit A—(Continued)

Witnesseth: The parties hereto are interested, directly and indirectly, financially and otherwise, in Dollar of Delaware, and deem the consummation of the Adjustment Plan respecting said company as hereinafter set forth to be mutually advantageous. Therefore, the parties hereto hereby adopt said Adjustment Plan, and agree that it shall be deemed to constitute, and shall constitute, an agreement by and between them, and in consideration of the agreements, covenants, commitments, undertakings, representations, and warranties therein set forth, and in consideration of the granting by the Commission of the five-year operating differential subsidy and the loan for repairs, rehabilitations and reconditioning therein referred to, subject expressly to the provisions of paragraph 23 of said Adjustment Plan, each of the parties hereto hereby respectively agree, with all reasonable dispatch, to do all of the things and take all the steps, acts, and proceedings, and execute and deliver all certificates, documents, instruments, and writings that it may legally do, take, or execute and deliver and that may be necessary or proper on its or his part to accomplish or facilitate the consummation of the transactions and deeds referred to and set forth in said Adjustment Plan. Said Adjustment Plan is as follows:

Adjustment Plan—Dollar Steamship
Lines, Inc., Ltd.

1. Dollar of California holds, or forthwith will acquire and hold, all of the issued and outstanding

Exhibit A—(Continued)

class B stock of Dollar of Delaware, which said stock consists of 2,100,000 shares and stands of record in the names of the respective parties hereinafter listed, and Dollar of California will transfer, or cause to be transferred, all of said stock to the Commission, or its nominee, free and clear of all liens and incumbrances:

	Shares
(a) Dollar of California.....	1,872,210
(b) Robert Dollar Co.....	227,790
	<hr/>
Total.....	2,100,000

2. The following named parties hold, or forthwith will acquire and hold, the number of shares of class A stock of Dollar of Delaware listed after their respective names, and each of said parties will respectively transfer, or cause to be transferred, to the Commission, or its nominee, free and clear of all liens and incumbrances, the respective number of shares so listed:

	Shares
(a) J. Harold Dollar estate.....	24,107
(b) R. Stanley Dollar	2,293
(c) H. M. Lorber	9,174
(d) Mortimer Fleishhacker	26,122
(e) Dollar of California	2,075
(f) Admiral Oriental	122
	<hr/>
Total.....	63,893

3. All rights and interests of the pledgor in and

Exhibit A—(Continued)

to the following listed class A stock of Dollar of Delaware will be transferred to the Commission, or its nominee, subject to existing pledges, and during the existence of said pledges, the Commission, or its nominee, shall have the voting rights accruing to such stock and the pledgor and pledgees will duly execute and deliver to the Commission or its nominee, from time to time, whenever requested, irrevocable proxies, giving full, unrestricted and unlimited rights to vote all such stock:

	Shares
Herbert Fleishhacker	33,000

4. All rights and interests of the respective pledgors in and to the following issued class A stock of Dollar of Delaware will be transferred to the Commission, or its nominee, subject to existing pledges and subject to option agreements referred to in paragraph 5 hereof:

	Shares
(a) R. Stanley Dollar	33,600
(b) J. Harold Dollar estate.....	11,273
(c) R. Stanley Dollar, J. Harold Dollar estate, and Herbert Fleishhacker, jointly	6,660

Total.....	51,533
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5. The Anglo Bank as pledgee and the respective pledgers of the class A stock referred to in paragraph 4 above, will execute and deliver option agreements respecting such stock which shall provide:

(a) For a period of five years from date, the

Exhibit A—(Continued)

Commission, or its nominee, shall have all voting rights accruing to the pledged A stock, and during such period no disposition shall be made of any such stock (other than by release to the Commission, or its nominee) except subject to the express right of the Commission to exercise all voting rights thereon, and during such period the pledgee, pledgors, and other holders of said stock will duly execute and deliver to the Commission, or its nominee, from time to time, wherever requested, irrevocable proxies, giving full, unrestricted, and unlimited rights to vote all such stock.

(b) For a period of five years from date, the Commission, or its nominee, shall have the right, at any time, to purchase and take over all rights and interests of the pledgee (including the rights and interests of the pledgee in and to all collateral then pledged) upon payment of a sum equal to the balance due on account of the loan for which the A stock is so pledged, and in such event to release said A stock from the pledge, and transfer said A stock to the Commission, or its nominee, free and clear.

(c) During the period terminating five years from date, the pledged A stock shall be released and transferred to the Commission, or its nominee, free and clear, upon receipt by the pledgee of payments on account of the loan equal in the aggregate to \$2 for each share of such A stock so pledged, from any source or sources, except only from the proceeds realized from the liquidation of pledged collateral other than such A stock (including but not limited

Exhibit A—(Continued)

to any payments that may be made by the pledgor; or that may be made by the Commission, or its nominee, or their respective assignees); and during such period no disposition shall be made of any such stock (other than by release to the Commission, or its nominee) except subject to the express right of the Commission, or its nominee, to receive such stock free and clear when the aggregate of such payments on account of the loan equals \$2 for each such share.

(d) For a period of five years from date, unless the A stock included in the pledge has been released and transferred to the Commission, or its nominee, free and clear, no other collateral securing the pledge shall be released from the pledge, except for full consideration (the determination of the loan committee of the pledgee in this regard to be conclusive) and no guarantee shall be released; and the Commission, or its nominee, shall have the right to full information respecting such pledge and all transactions affecting the same.

(e) A legend shall be stamped upon all certificates evidencing the stock covered by said option agreements, making appropriate reference to said agreements and to the transfer of rights and interests in and to said stock in accordance with paragraph 4 of this Adjustment Plan.

6. Dollar of Delaware will make cash payments to such of the parties hereto as may incur expense for stock transfer taxes in connection with the transfers above referred to, which payments shall

Exhibit A—(Continued)

equal the respective amounts of such expenses so incurred.

7. The management agreement between Dollar of California and Robert Dollar Co., dated June 23, 1926 (to which Dollar of Delaware is the assignee of Dollar of California) will be terminated and cancelled by said parties. The matter of the adjustment or settlement of any rights and claims in connection with said contract as between Dollar of California and Robert Dollar Co. shall be handled by said companies by separate agreement on such basis as may be agreed to by and between them, but no obligations or liability shall be imposed upon or result or accrue to Dollar of Delaware or any of the other parties hereto by reason of such termination and cancellation.

8. Dollar of Delaware will take over and assume all leases of Robert Dollar Co. for offices, space, and premises acquired by Robert Dollar Co. and used by it in the performance of its activities as managing agent under and pursuant to said management agreement of June 23, 1926, exclusive of the office at Manila, P. I., in such manner that Dollar of Delaware shall assume no obligation to any landlord which shall be more extensive than the existing obligation of Robert Dollar Co. and so as to preserve and vest in Dollar of Delaware all rights, if any exist, against any landlord by reason of said leases. Dollar of Delaware will hold Robert Dollar Co. harmless by reason of any liability or obligations that it has or may have by reason of said

Exhibit A—(Continued)

leases which arose or may arise subsequent to January 25, 1938. For a period of six months from date Dollar of Delaware shall have the right but shall have no obligation to use and occupy the space in said premises at Manila, P. I., at the same rental which it has been paying therefor since January 25, 1938.

9. Dollar of California will acquire from Robert Dollar Co. clear and unincumbered title to all office furniture, furnishings, fixtures, and equipment now situate in the offices and premises referred to in paragraph 8 hereof, including said office at Manila, P. I., and also all other such property (if there should be any) which Robert Dollar Co. acquired for the purpose of handling its activities as said managing agent and which it now owns and holds, and also all automobiles so acquired, owned and held (including, but without limitation, the Chrysler automobile used by Robert Dollar in San Francisco), and Dollar of California will sell all said property to Dollar of Delaware, and Dollar of Delaware will purchase all of said property from Dollar of California, for the sum of \$100,000, payable \$35,000 in cash, and \$65,000 in preferred stock of Dollar of Delaware at the par value thereof.

10. Dollar of Delaware will take into its employ all of the personnel of Robert Dollar Co. engaged in managing agent's activities. Robert Dollar Co. represents and warrants that it has no contracts of employment with any of said employees, nor has it any undischarged obligations or liabilities to any

Exhibit A—(Continued)

of said employees which said employees were legally entitled to have had discharged on or prior to January 25, 1938, notwithstanding their employment continued after said date. Dollar of Delaware shall have no obligation to retain any of said employees, and shall have no obligations or liability to any of said employees in the event it hereafter should terminate their employment, except only such obligations and liability as may be imposed by law.

11. If Robert Dollar Co. obtains a modification of its existing lease for space in the Robert Dollar Building, San Francisco, between Robert Dollar Co. and the owners of said building, dated April 1, 1937, so as to include therein, without additional rental, the 3,460 square feet of space in the basement of said building which is being used for storage purposes, and so as to provide, at the expense of the owners of said building, for such changes in partitions and in the arrangement of the elevator court as Dollar of Delaware may desire, Dollar of Delaware will affirm and assume such lease, and such lease shall be duly approved by the Commission.

12. Dollar of Delaware, within six months from the date of this agreement, will relinquish all rights to the use of the name "Dollar," and all rights to use the Dollar flag and insignia. During such six-month period, unless said rights are earlier so relinquished, Dollar of Delaware will continue to have the right to use said name, flag, and insignia.

13. Dollar of California, Admiral Oriental, Pacific Lighterage Corporation, Robert Dollar Co., and

Exhibit A—(Continued)

Olympic Refining Co. will give such confirmations, receipts, releases, and agreements as may be deemed necessary or proper to foreclose any attack on transactions that have been had in connection with the debt adjustments referred to in the compilation entitled "Financial Readjustments in Dollar Steamship Lines, Inc., Ltd." and issued by the Commission under date of February 17, 1938, pages 22 to 25, inclusive.

14. The Commission and Dollar of Delaware will release R. Stanley Dollar and Dollar of California from all liability as makers, comakers, guarantors, or endorsers of the ship mortgage notes covering the steamships President Harrison, Hayes, Adams, Garfield, Polk, Monroe, Van Buren, Taft, Cleveland, Wilson, Lincoln, and Pierce in such manner as to preserve and protect the liability of Dollar of Delaware on said ship mortgages and the priorities of said mortgages, and Dollar of Delaware will do and take all action and proceedings and authorize, execute, and deliver all instruments and writings that may be necessary to accomplish such result or that the Commission may deem advisable for such purpose, and agrees that said releases shall not release or in any way impair its obligations under said notes or said mortgages securing the same, nor shall any credits be allowed or given thereon, either as to principal or interest, by reason of the stock transfers or other consideration that may be received by the Commission under the terms and provisions hereof. The Commission and

Exhibit A—(Continued)

Dollar of Delaware will deliver to R. Stanley Dollar and Dollar of California such instruments as may be necessary or proper to evidence said releases. Appropriate endorsements to evidence said releases shall be made upon each of said ship mortgage notes on which R. Stanley Dollar and Dollar of California, or either of them, are makers, comakers, or endorsers, and said notes shall be deposited in escrow with instructions to the escrow holder to make the same available for inspection, upon directions of the Commission, or R. Stanley Dollar, or Dollar of California, to any parties, court, commissions, or other groups or bodies designated in such directions.

15. Dollar of Delaware will hold Robert Dollar Co., Dollar of California, Admiral Oriental, and their respective officers and directors, harmless from all liability that has or may hereafter accrue under that certain contract dated April 23, 1930, by and between Robert Dollar Co., Dollar of California, Admiral Oriental, and Dollar of Delaware, as parties of the first part and collectively referred to in said agreement as the Dollar companies, and Matson Navigation Company, Matson Navigation Corporation, Ltd., and Oceanic Steamship Company, as parties of the second part and collectively referred to in said agreement as the Matson companies, by reason of any actions on the part of Dollar of Delaware which have created or may hereafter create any liability to said Matson companies

Exhibit A—(Continued)

for which said Dollar companies, or their respective officers or directors, may be held accountable.

16. Dollar of Delaware will hold R. Stanley Dollar, personally and as an officer and director of Dollar of Delaware, harmless by reason of his personal guarantee of February 20, 1934, to London Steamship Owners' Mutual Insurance Association, Ltd., and will make application to said association to release R. Stanley Dollar from said guarantee, and if it should be necessary to accomplish such result Dollar of Delaware will undertake to obtain a surety company guarantee as a substitute for said personal guarantee of R. Stanley Dollar and if it should be able to obtain such substituted guarantee it will do so and thereby effect such substitution. If Dollar of Delaware should be unable to obtain such lease within 90 days from the date hereof, R. Stanley Dollar thereafter shall have the right to give notice to said association that he withdraws all said personal guarantees.

17. Dollar of Delaware and R. Stanley Dollar, and Dollar of Delaware and H. M. Lorber, will give mutual releases of and from all claims based upon past transactions.

18. The Commission, the Anglo Bank, Dollar of California, Dollar Wharf & Warehouse Co., and Dollar of Delaware will take all action and proceedings necessary or proper to effect an extension of their outstanding Fillmore-Johnson mortgages for a period of one year, without amortization, and

Exhibit A—(Continued)

so as to provide that the rights of the mortgagees shall be limited to the collateral.

19. The Anglo Bank, Dollar Terminal Steamship Company and the Commission will take all action and proceedings and give all consents that may be necessary or proper to effect the cancellation of the indebtedness of Dollar of Delaware to Dollar Terminal Steamship Company. (See Compilation, p. 23 (c).)

20. The Anglo Bank and Dollar of Delaware will modify the agreement between them dated January 17, 1938, so as to provide that each of the dates in the amortization schedule set forth in paragraph 1 of said agreement be set forward six months.

21. Dollar of Delaware will take all steps and proceedings and will duly authorize, execute and deliver all formal applications that may be required by the Commission and by the Reconstruction Finance Corporation, and all mortgages, promissory notes, and other writings and instruments that may be necessary or proper to—

(a) Obtain a five-year operating differential subsidy from the Commission;

(b) Obtain a loan of approximately \$1,500,000 from the Commission for the purpose of meeting the expense of repairing, rehabilitating, and reconditioning its vessels;

(c) Obtain a loan of not less than \$2,000,000 from the Reconstruction Finance Corporation for operating capital; and

(d) Meet and comply with all requirements of

Exhibit A—(Continued)

the Commission and the Reconstruction Finance Corporation, as to security or otherwise, which may be imposed as conditions to granting said subsidy and said loan or loans.

22. The class A and class B stock to be transferred to the Commission, or its nominee, free and clear or subject to existing pledges, the option agreement relating to the class A stock to be transferred subject to existing pledges, and the instruments and writings necessary or proper to accomplish the objectives and results set forth in paragraphs 1 to 20, inclusive, shall forthwith be deposited in escrow and the same shall be delivered to the respective parties entitled thereto when and if the subsidy agreement referred to in paragraph 21 above has been entered into and the loans so referred to have been made, or firm commitments therefor have been obtained. In the event said subsidy agreement has not been entered into and said loans have not been made or firm commitments for said loans have not been obtained within sixty days from the date hereof, each of the parties hereto shall have the right to demand and receive the return of all stock certificates, option agreements, and other instruments and writings which said parties have respectively so deposited in escrow, and in the event of any such withdrawal or withdrawals, the respective obligations of the parties hereto based or founded upon the terms and provisions of this agreement shall thereupon cease and terminate. Dollar of Delaware shall pay all escrow fees that may

Exhibit A—(Continued)

be incurred in connection with the above transactions.

23. It is expressly understood and agreed by and between the parties hereto that the Commission has and shall have no duties or obligations whatever to any of the other parties hereto except only such duties and obligations as it herein expressly assumes and agrees to meet and perform and such duties and obligations as it may expressly agree to meet and perform in said subsidy agreement and in any agreement it may enter into in respect of said loan for repairs, rehabilitation and reconditioning, and in this connection it is hereby expressly understood and agreed—

(a) That the Commission has not undertaken or agreed, and does not undertake or agree hereby, to enter into said subsidy agreement unless and until the findings and determinations required by law with respect to such subsidy agreement have been made by the Commission, and terms and conditions respecting such subsidy agreement have been arrived at by the Commission and the party or parties to the subsidy agreement;

(b) That the Commission has not undertaken or agreed, and does not undertake or agree hereby, to enter into any agreement with respect to a loan for repairs, rehabilitation, and reconditioning unless and until any findings and determinations required by law in connection with such loans shall have been made by the Commission, and the Commission and

Exhibit A—(Continued)

the parties to the loan have arrived at satisfactory terms and conditions;

(c) That the Commission has not undertaken or agreed, and does not undertake or agree hereby, to take any action with reference to the proposed loan of not less than two million dollars from the Reconstruction Finance Corporation for operating capital unless and until any findings and determinations required by law with respect to the subordination of any indebtedness to the Commission to the mortgage or mortgages securing said loan from the Reconstruction Finance Corporation have been made by the Commission, and that the only obligations of the Commission are to furnish the Reconstruction Finance Corporation such information concerning Dollar of Delaware as may be requested by the Reconstruction Finance Corporation and in the possession of the Commission, and subject to the findings and determinations aforesaid and if the conditions of the loan are satisfactory to the Commission, to subordinate the existing indebtedness on the operating fleet of Dollar of Delaware which is owed to the Commission to the mortgage or mortgages securing said loan from the Reconstruction Finance Corporation;

(d) That the Commission shall have no duty or obligation to make any payments, loans, or advances whatever to Dollar of Delaware or to any creditor of said company or otherwise except only in such amounts and under such terms and conditions as may be expressly provided in said subsidy and loan

Exhibit A—(Continued)

agreements, nor shall it have any duty or obligation whatever to continue, or to provide for the continuation of the operations, or any part of the operations, of Dollar of Delaware except as may in said agreements be expressly provided, nor shall it have any duty or obligation to continue to hold any of the stock, or any interest in or to any of the stock, of Dollar of Delaware which it may acquire under the terms and provisions hereof or otherwise; and

(e) That the sole right of any party hereto under this agreement in the event a subsidy agreement is not entered into or the loans mentioned are not made or firm commitments therefor obtained shall be to terminate this agreement in accordance with paragraph 22 hereof.

In witness whereof, the individual parties, and Keith R. Ferguson, and Robert Dollar II, as executors of the estate of John Harold Dollar, also known as J. Harold Dollar, deceased, have executed fifteen counterpart originals of this agreement by affixing their respective signatures thereto (such execution of this agreement by said executors being subject to such confirmation by the court in said estate proceedings as may be required by law), and the other parties have caused such counterparts to be executed by their respective duly authorized officers or representatives.

DOLLAR STEAMSHIP LINES,
INC., LTD.,

[Seal] By ARTHUR B. POOLE, Vice President

Exhibit A—(Continued)

Attest: D. T. Buckley, Secretary.

DOLLAR STEAMSHIP LINE,

[Seal] By M. THOMPSON, 2d Vice President.

Attest: A. E. Lang, Assistant Secretary.

THE ROBERT DOLLAR CO.,

[Seal] By H. M. LORBER, Vice President.

Attest: Robert P. Seeley, Assistant Secretary.

ADMIRAL ORIENTAL LINE,

[Seal] By ROBERT DOLLAR II, Vice Pres.

Attest: E. H. Hall, Secretary.

PACIFIC LIGHTERAGE CORPORATION,

[Seal] By R. H. ANDERSON, President.

Attest: L. C. Ross, Assistant Secretary.

OLYMPIC REFINING COMPANY,

[Seal] By PHILIP E. JOHNSON, Vice Pres.

Attest: K. Brendel, Secretary.

DOLLAR WHARF & WAREHOUSE COMPANY,

[Seal] By O. G. STEEN, President.

Attest: J. A. Tognetti, Assistant Secretary.

DOLLAR TERMINAL STEAMSHIP COMPANY,

[Seal] By H. M. LORBER, Vice President.

Attest: E. C. Kester, Assistant Secretary.

/s/ R. STANLEY DOLLAR,

/s/ KEITH R. FERGUSON,

/s/ ROBERT DOLLAR, II.,

as Executors of the Estate of John Harold Dollar,
also known as J. Harold Dollar, deceased.

/s/ H. M. LORBER,

Exhibit A—(Continued)

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO

[Seal] By P. E. HOOVER, Vice President.

Attest: R. H. Holmberg, Assistant Secretary.

/s/ MORTIMER FLEISHHACKER,

HERBERT FLEISHHACKER

UNITED STATES MARITIME

COMMISSION,

By REGINALD S. LAUGHLIN,

Special Counsel.

EXHIBIT C

NOTICE AND DEMAND

To: American President Lines, Ltd.;

To: Each of its Directors;*

To: Each of its Officers.

You, and each of you, are hereby advised that the persons and corporations listed below are the owners of shares of stock of American President Lines, Ltd., now standing on the books of the corporation in the name of United States Maritime Commission, as follows:

Dollar Steamship Lines—2,100,000 shares of B stock of said corporation, and 2,075 shares of A stock of said corporation;

R. Stanley Dollar—51,174 shares Class A stock of said corporation;

H. M. Lorber—9,174 shares Class A stock of said corporation; and

* George Killion, Ralph K. Davies, LeRoy M. Edwards, Edward H. Heller, Paul E. Hoover, Frank J. O'Connor, M. J. Buckley and Arthur B. Poole.

Exhibit C—(Continued)

The Robert Dollar Co.—37,722 shares of Class A stock of said corporation.

And said shares being evidenced by certificates as follows:

Certificate of Dollar Steamship Lines, Inc., Ltd., No. BX-26 for 2,099,994 shares of Class B stock;

Certificate of Dollar Steamship Lines, Inc., Ltd., No. BX-27 for 1 share of Class B stock;

Certificate of Dollar Steamship Lines, Inc., Ltd., No. BX-28 for 5 shares of Class B stock;

Certificate of Dollar Steamship Lines, Inc., Ltd., No. AX-10 for 63,893 shares of Class A stock; and

36,000 shares of Class A stock from out of the total of 49,313 shares represented by Certificate No. A-150.

A copy of a judgment duly made and entered on December 11, 1950, by and in the United States District Court for the District of Columbia adjudging the undersigned as the owners of said shares and certificates is attached hereto.

For many years past, you, and each of you, or your predecessors, have unlawfully withheld from the undersigned the possession and enjoyment of said shares and said certificates and all of the rights incident to the ownership and possession thereof and you, and each of you, are continuing now to do so.

Demand is made on you, and each of you, to forthwith surrender or cause to be surrendered to the undersigned and their authorized representa-

Exhibit C—(Continued)

tives possession and enjoyment of said shares and certificates, and to cause to be transferred into the name of and issued to the undersigned and no other person or persons, certificates evidencing their right to the possession and enjoyment of said shares and the control of said corporation and its management, property and affairs to the undersigned as the owners of the controlling interest in said corporation.

And demand is further made upon you to cause the undersigned to be registered on the books of the said corporation as the owners respectively of the shares in the amounts stated above.

For failure to comply with the foregoing demands, you, and each of you, will be held fully and strictly accountable for any and all loss or injury which the persons and corporations listed herein as the owners of said stock, or any of them, may suffer by reason of the detention of the control of said corporation and its property and affairs, and for the unlawful detention of the possession and enjoyment of said shares and said certificates, and for any and all loss, liability or injury which the corporation or its stockholders, including the persons and corporations on whose behalf this notice is given, may suffer by reason of any disbursement or transfer of the funds or property of the corporation or by reason of any agreement, contract, undertaking or commitment by or on behalf of said corporation as to all of which you, and each of you, are entirely without right or authority.

Exhibit C—(Continued)

Dated at San Francisco, California, this 16th day of December A.D. 1950.

/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for R. Stanley Dollar, Dollar Steamship Line, a corporation, The Robert Dollar Co., a corporation, and H. M. Lorber.

In the United States District Court for the
District of Columbia

Civil Action No. 31,468

R. STANLEY DOLLAR, et al.,

Plaintiffs,

vs.

EMORY S. LAND, et al.,

Defendants.

ORDER ON MANDATE AND FINAL
JUDGMENT

This matter came on for hearing on motion of plaintiffs to enter judgment on mandate of the Court of Appeals and to call up for hearing motion to substitute, and after argument by counsel the Court concludes that since the Court of Appeals in its opinion decided that “—the 1938 contract resulted not in an outright transfer but in a pledge of the shares—” and directed this Court to enter judgment in accordance with that opinion,

Exhibit C—(Continued)

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, as follows:

1. That in conformance with and obedience to the said mandate of the Court of Appeals the judgment of this Court of the 2nd day of December 1948 is hereby vacated.

2. That under the provisions of Rule 70 FRCP, which specifies "If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law", that title to the shares in question is in the plaintiffs,* since they were never legally divested of the same, and the asserted title of all others arising out of the same transaction to the contrary null and void, and that they are entitled to the delivery and possession of said shares, and entitled further as provided by said Rule if such may be necessary,"—to a writ of execution or assistance upon application to the clerk".

/s/ MATTHEW F. McGUIRE,

December 11, 1950. J.

* Plaintiff Dollar Steamship Line 2,100,000 shares of the B stock and 2,075 shares of the A stock;

Plaintiff R. Stanley Dollar 51,174 shares of the A stock;

Plaintiff The Robert Dollar Co. 37,722 shares of the A stock;

Plaintiff H. M. Lorber, 9,174 shares of the A stock.

EXHIBIT D

To: American President Lines, Ltd.

To: Each of its Directors;

To: Each of its Officers.

Supplementing the notice and demand directed to you under date of December 16, 1950 for the transfer of certain shares and share certificates representing capital stock of American President Lines, Ltd. to Dollar Steamship Lines, R. Stanley Dollar, H. M. Lorber, and The Robert Dollar Co., there is attached hereto for your further information a copy of the decision of the United States Court of Appeals rendered on January 31, 1951, on the basis of which the undersigned renews all of the demands made upon you in said notice and demand of December 16, 1950.

Dated at San Francisco, California, this 7th day of February, 1951.

BROBECK, PHLEGER & HARRISON,
Attorneys for R. Stanley Dollar, Dollar Steamship Line, a corporation, The Robert Dollar Co., a corporation, and H. M. Lorber.

EXHIBIT E

NAC:DBM:145-147-15

Washington, D. C., Dec. 18, 1950

Straight Message

Mr. Joseph A. Tognetti and

American President Lines, Ltd.

311 California Street, San Francisco, California

Supplementing my telegram to Mr. Tognetti of

December 15, I understand R. Stanley Dollar and others have made demand upon Mr. Tognetti as transfer agent for Class A Common Stock of American President Lines, Ltd. and upon American President Lines, Ltd. as issuing corporation that certain stock certificates of that company outstanding in the name of United States Maritime Commission be cancelled and that appropriate record be made to show R. Stanley Dollar and others as owners of such stock. Understand that this demand is made on basis of orders of United States District Court for the District of Columbia dated December 11 and 15, 1950 in case of Dollar v. Land, Number 31468. The United States and others have taken an appeal from these orders. District Court today entered an order staying execution of its final judgment. You will act at your peril and will be held strictly accountable to the United States for any action you may take in derogation of the title to said stock claimed by the United States.

CLAPP

Acting Assistant Attorney General

EXHIBIT F

NAC:DBM—145-147-15

dk

Washington, D. C., Jan. 31, 1951

Mr. Joseph A. Tognetti and
American President Lines, Ltd.

311 California St., San Francisco, Calif.

You are hereby notified that the Government proposes to take further proceedings with reference to

the decision of the Court of Appeals of the District of Columbia Circuit of January 31, 1951, in cases of Land, United States, and Sawyer Secretary of Commerce against R. Stanley Dollar and Others. You will act at your peril and will be held strictly accountable to the United States for any action which you may take in derogation of the title to said stock claimed by the United States.

CLAPP

Acting Assistant Attorney General

EXHIBIT G

NAC:DBM: 145-147-15

mm

Straight Message

Washington, D. C., Dec. 12, 1950

Wells Fargo Bank and Union Trust Company
Market and Montgomery Streets,
San Francisco, California

As transfer agent of the common stock of American President Lines, Ltd., you are hereby informed that the United States continues to claim title to two million, one hundred thousand shares of the B stock and one hundred thousand, one hundred and forty-five shares of the A stock of that company for which it holds certificates in the name of United States Maritime Commission. The United States proposes to take further judicial proceedings with respect to the Order on Mandate and Final Judgment entered by the United States District Court

for the District of Columbia on December 11, 1950, in the case of Dollar et al. v. Land et al., Number 31468. Accordingly, you will act at your peril in recognizing any claim of title to said stock by third persons in derogation of the title of the United States.

CLAPP

Acting Assistant Attorney General

EXHIBIT H

NAC:DBM: 145-147-15

mm

Straight Message

Washington, D. C., Dec. 15, 1950

Wells Fargo Bank and Union Trust Company
Market and Montgomery Streets
San Francisco, California

Supplementing my telegram to you of December 12 you as transfer agent of the common stock of American President Lines, Ltd., are hereby informed that the United States has taken an appeal from the final judgment entered by the United States District Court for the District of Columbia on December 11, 1950, in the case of Dollar v. Land, Number 31468. Accordingly, I again inform you you will act at your peril in recognizing any claim of title to said stock by third persons in derogation of the title of the United States.

CLAPP

Acting Assistant Attorney General

EXHIBIT I

NAC:DBM: 145-147-15

mm

Straight Message

Washington, D. C., Dec. 18, 1950

Wells Fargo Bank and Union Trust Company
Market and Montgomery Streets
San Francisco, California

Supplementing my telegram to you of December 15, I understand R. Stanley Dollar and others have made demand upon you that certain stock certificates of American President Lines, Ltd., of which you are transfer agent, outstanding in the name of United States Maritime Commission be canceled and that appropriate record be made to show R. Stanley Dollar and others as owners of such stock. Understand that this demand is made on basis of orders of United States District Court for the District of Columbia dated December 11 and 15, 1950 in case of Dollar v. Land, Number 31468. The United States and others have taken an appeal from these orders. District Court today entered an order staying execution of its final judgment. You will act at your peril and will be held strictly accountable to the United States for any action you may take in derogation of the title to said stock claimed by the United States. Letter follows.

CLAPP

Acting Assistant Attorney General

EXHIBIT J

NAC:DBM: 145-147-15

Dec. 19, 1950

Wells Fargo Bank and

Air Mail

Union Trust Company

mm

Market and Montgomery Streets

San Francisco, California

Re: Dollar v. Land, D.C. D.C. Civil No. 31468

Gentlemen:

There is enclosed a confirmatory copy of my telegram to you of December 18 putting you on notice that you will act at your peril and you will be held strictly accountable to the United States for any action you may take in derogation of the title to the stock of American President Lines, Ltd. claimed by the United States. There is also enclosed a copy of the memorandum opinion entered by the District Court today ordering a stay of execution of the final judgment.

We are informed that you have referred this matter to your counsel Lloyd W. Dimkelsteil. Accordingly, we are also writing to him about our position in this matter.

Sincerely yours,

For the Attorney General.

NEWELL A. CLAPP

Acting Assistant Attorney General

Enclosures No. 446917.

EXHIBIT K

NAC:DBM: 145-147-15

Dec. 19, 1950

Lloyd W. Dimkelsteil, Esquire

Air Mail

Heller, Ehrman, White & McAuffly

mm

14 Montgomery St., San Francisco, California

Re: Dollar v. Land, D.C. D.C. Civil No. 31468

Dear Mr. Dimkelsteil:

I understand that you are representing the Wells Fargo Bank and Union Trust Company in the matter of the demands made upon it by R. Stanley Dollar and others to cancel certain stock certificates of American President Lines, Ltd., now outstanding in the name of United States Maritime Commission and that appropriate record be made to show R. Stanley Dollar and others as owners of such stock.

Your client has no doubt shown you our telegrams to it of December 12 and 15. There is also enclosed a copy of my further telegram to the Wells Fargo Bank of December 18.

As appears from those telegrams, the United States still claims to be the outright owner of these stock certificates and the shares which they represent. There is enclosed for your information a copy of a letter from the President of the United States to the Secretary of Commerce on this subject dated November 30, 1950.

We understand that the demands which were made upon your client are based upon the final judgment of the District Court in this case dated December 11 and the denial by the District Court on December 15 of our motions to vacate and set

aside that final judgment. There are enclosed copies of (1) special appearance by the United States and motion to set aside and vacate final judgment, (2) special appearance by the Secretary of Commerce and motion to set aside and vacate final judgment, and (3) supporting memorandum of points and authorities.

Notices of appeal to the Court of Appeals for the District of Columbia were filed on December 15 by the United States, Charles Sawyer, Secretary of Commerce, and by the defendants Emory S. Land, et al.

On application by the United States, the District Court entered a memorandum opinion staying execution of the final judgment pending appeal. A copy of that memorandum opinion is also enclosed. In the light of the position of the Government set forth in these papers you will appreciate why we have notified the Wells Fargo Bank that it will act at its peril and will be held strictly accountable to the United States for any action it may take in derogation of the title to said stock claimed by the United States.

If you desire any further information in this matter, I shall be pleased to furnish it upon your request.

Sincerely yours,

For the Attorney General

NEWELL A. CLAPP

Acting Assistant Attorney General

Enclosure No. 446918

EXHIBIT L

NAC:DBM: 145-147-15

dk

Washington, D. C., January 31, 1951

Wells Fargo Bank and Union Trust Company
Market and Montgomery Streets
San Francisco, Calif.

You are hereby notified that the Government proposes to take further proceedings with reference to the decision of the Court of Appeals of the District of Columbia Circuit of January 31, 1951, in cases of Land, United States, and Sawyer Secretary of Commerce against R. Stanley Dollar and others. You will act at your peril and will be held strictly accountable to the United States for any action which you as transfer agent of the stock of American President Lines Ltd. may take in derogation of the title to said stock claimed by the United States.

CLAPP

Acting Assistant Attorney General

EXHIBIT M

In the United States Court of Appeals for the
District of Columbia Circuit

No. 10868

Emory S. Land, et al., Appellants,

vs.

R. Stanley Dollar, et al., Appellees.

No. 10875

United States, Appellant,

vs.

R. Stanley Dollar, et al., Appellees.

No. 10876

Charles Sawyer, Secretary of Commerce,
Appellant,

vs.

R. Stanley Dollar, et al., Appellees.

NOTICE

To: Wells Fargo Bank and Union Trust Company,
Market and Montgomery Streets, San Francisco,
California.

You, as transfer agent of stock certificates of American President Lines, Ltd., are hereby notified that the above-captioned appeals have been taken from the order on mandate and final judgment entered on December 11, 1950, by the United States District Court for the District of Columbia in the case of R. Stanley Dollar, et al., Plaintiffs, v. Emory S. Land, et al., Defendants, Civil Action No. 31468, and from the order entered by said Dis-

trict Court in said case on December 15, 1950, denying the motions of the United States and Charles Sawyer, Secretary of Commerce, to set aside and vacate said order on mandate and final judgment entered December 11, 1950.

/s/ NEWELL A. CLAPP,
Acting Assistant Attorney General

/s/ EDWARD H. HICKEY,
Attorney, Department of Justice

/s/ DONALD B. MacGUINEAS,
Attorney, Department of Justice.

Return on Service of Writ

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Notice on the therein-named Wells Fargo Bank and Union Trust Company by handing to and leaving a true and correct copy thereof with Elmer H. Shine, Assistant Secretary, personally at Market and Montgomery Sts., San Francisco, in said District on the eighteenth day of January, 1951.

EDWARD J. CARRIGAN,
U. S. Marshal.

/s/ By WARREN D. CAIN,
Deputy.

Marshal's Costs: Travel, 40c; service, \$2.00; total, \$2.40.

[Stamped]: Received Jan. 18, 1951. U. S. Marshal's Office, San Francisco, Calif.

EXHIBIT N

NAC:DBM: 145-147-15

mm

Straight Message

Washington, D. C., Dec. 12, 1950

Mr. Joseph A. Pognetti

American President Lines, Ltd.

311 California St., San Francisco, Calif.

As secretary and transfer agent of the Class A common stock of American President Lines, Ltd., you are hereby informed that the United States continues to claim title to one hundred thousand, one hundred forty five shares of the Class A common stock of that company for which it holds certificates in the name of United States Maritime Commission. The United States proposes to take further judicial proceedings with respect to the Order on Mandate and Final Judgment entered by the United States District Court for the District of Columbia on December 11, 1950, in the case of Dollar et al. v. Land et al., Number 31468. Accordingly, you will act at your peril in recognizing any claim of title to said stock by third persons in derogation of the title of the United States.

CLAPP

Acting Assistant Attorney General

EXHIBIT O

NAC:DBM: 145-147-15 mm Straight Message
Mr. Joseph T. Tognetti Washington, Dec. 15, '50
American President Lines, Ltd.
311 California St., San Francisco, California

Supplementing my telegram to you of December 12 you as secretary and transfer agent of the Class B common stock of American President Lines, Ltd. are hereby informed that the United States has taken an appeal from the final judgment entered by the United States District Court for the District of Columbia on December 11, 1950, in the case of Dollar v. Land, Number 31468. Accordingly, I again inform you you will act at your peril in recognizing any claim of title to said stock by third persons in derogation of the title of the United States.

CLAPP

Acting Assistant Attorney General

EXHIBIT P

In the United States Court of Appeals for the
District of Columbia Circuit

[Title of Causes Nos. 10868, 10875, 10876.]

NOTICE

To: Joseph A. Pognetti, Esquire, American President Lines, Ltd., 311 California Street, San Francisco, California.

You, as transfer agent of stock certificates of American President Lines, Ltd., are hereby noti-

fied that the above-captioned appeals have been taken from the order on mandate and final judgment entered on December 11, 1950, by the United States District Court for the District of Columbia in the case of *R. Stanley Dollar, et al., Plaintiffs, v. Emory S. Land, et al., Defendants*, Civil Action No. 31468, and from the order entered by said District Court in said case on December 15, 1950, denying the motions of the United States and Charles Sawyer, Secretary of Commerce, to set aside and vacate said order on mandate and final judgment entered December 11, 1950.

/s/ NEWELL A. CLAPP,
Acting Assistant Attorney General

/s/ EDWARD H. HICKEY,
Attorney, Department of Justice

/s/ DONALD B. MacGUINEAS,
Attorney, Department of Justice

Return on Service of Writ

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Notice on the therein-named Joseph A. Pognetti, true name Joseph A. Tognetti, by handing to and leaving a true and correct copy thereof with Joseph A. Pognetti, true name Joseph A. Tognetti,

personally at 311 California St., San Francisco, in said District on the eighteenth day of January, 1951.

EDWARD J. CARRIGAN,

U. S. Marshal

/s/ By WARREN D. CAIN,

Deputy.

Marshal's Costs: Travel, 40c; Service, \$2.00; total, \$2.40.

[Stamped]: Received Jan. 18, 1951, U. S. Marshal's Office, San Francisco, Calif.

EXHIBIT Q

NAC:DBM: 145-147-15

mm

Straight Message

Washington, D. C., December 18, 1950

The Anglo-California National Bank of
San Francisco

One Sansome St., San Francisco, California

I understand R. Stanley Dollar and others have made demand upon you as registrar for Class A stock of American President Lines, Ltd. that certain stock certificates outstanding in the name of the United States Maritime Commission be cancelled and that appropriate record be made to show R. Stanley Dollar and others as owners of such stock. Understand that this demand is made on basis of orders of United States District Court for the District of Columbia dated December 11 and 15, 1950, in case of Dollar v. Land, Number 31468. The

United States and others have taken an appeal from these orders. District Court today entered an order staying execution of its final judgment. You will act at your peril and will be held strictly accountable to the United States for any act on you may take in derogation of the title to said stock claimed by the United States. Letter follows.

CLAPP

Acting Assistant Attorney General

EXHIBIT R

NAC:DBM: 145-147-15

dk

Washington, D. C., January 31, 1951

The Anglo-California National Bank of

San Francisco

1 Sansome St., San Francisco, California

You are hereby notified that the Government proposes to take further proceedings with reference to the decision of the Court of Appeals of the District of Columbia Circuit of January 31, 1951, in cases of Land, United States, and Sawyer Secretary of Commerce against R. Stanley Dollar and others. You will act at your peril and will be held strictly accountable to the United States for any action which you as registrar of the stock of American President Lines Ltd. may take in derogation of the title to said stock claimed by the United States.

CLAPP

Acting Assistant Attorney General

[Endorsed]: Filed March 12, 1951.

[Title of District Court and Cause No. 30407.]

NOTICE

To: R. Stanley Dollar, 311 California Street, San Francisco, Calif.; Dollar Steamship Line, a corporation, 311 California Street, San Francisco, California; The Robert Dollar Co., a corporation, 311 California Street, San Francisco, California; H. M. Lorber, Mountain Home Road, Woodside, California; American President Lines, Ltd., a corporation, 311 California Street, San Francisco, California; Wells Fargo Bank and Union Trust Co., a corporation, Market and Montgomery Street, San Francisco, California; Joseph A. Tognetti, c/o American President Lines, Ltd., 311 California Street, San Francisco, California; The Anglo California National Bank of San Francisco, a corporation, No. 1 Sansome Street, San Francisco, California.

Please Take Notice that the undersigned will bring on for hearing before a Judge of this Court, on the 26th day of March, 1951, at 10 o'clock a.m. of said day, or as soon thereafter as they may be heard, a motion by plaintiff for a preliminary injunction in the form attached hereto, which motion will be supported by the verified complaint and affidavits of E. L. Cochrane and Donald B. Mac-

Guineas, and a supporting Memorandum of Points and Authorities, copies of which are attached to this notice.

/s/ PHILIP H. ANGELL,
Special Assistant to the Attorney
General

/s/ DONALD B. MacGUINEAS,
Attorney, Department of Justice
Attorneys for Plaintiff.

[Endorsed]: Filed March 19, 1951.

[Title of District Court and Cause No. 30407.]

MOTION FOR PRELIMINARY INJUNCTION

To the Honorable Judges of said Court:

Comes now the United States of America, plaintiff, by its attorneys, and moves this Court for a preliminary injunction as follows:

1. That the defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, and their respective officers, agents and attorneys, be enjoined, pending the entry of final judgment in this action, from exercising or attempting to exercise any rights or privileges as the owners of stock certificates numbered BX-26, BX-27, BX-28, AX-10 and A-150 and the shares of stock represented thereby consisting of 100,145 shares of Class A stock and 2,100,000 shares of Class B stock of defendant American President Lines, Ltd.; and from making any demands upon defendants American President Lines, Ltd., Wells Fargo Bank and

Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco that new certificates representing said shares of stock of defendant American President Lines, Ltd. be issued to defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber, or that they be registered as the owners of said shares of stock; and from pledging, selling, transferring or otherwise disposing of said stock certificates and the shares of stock or any interest therein represented thereby;

2. That defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and the Anglo California National Bank of San Francisco, their respective officers, agents and attorneys be enjoined, pending the entry of final judgment in this action, from issuing any new stock certificates of defendant American President Lines, Ltd., representing said shares to defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber; from registering defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, or any of them, as owners of any of the shares of stock of defendant American President Lines, Ltd., now represented by certificates numbered BX-26, BX-27, BX-28, AX-10 and A-150; and from in any way recognizing said defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, or any of them, as the lawful owners of said certificates or said shares of stock.

Plaintiff alleges the following as grounds for the issuance of such preliminary injunction:

1. The United States, on the one hand, and the defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber (hereafter called the Dollar defendants), on the other hand, each claim to be the lawful owners of the stock of defendant American President Lines, Ltd., referred to above, which represents approximately 92% of the voting stock of that corporation. The United States has filed this complaint to obtain an adjudication of these conflicting claims and to quiet the Government's title to the stock.

2. American President Lines, Ltd., operates a cargo and passenger berth service around the world, trans-Pacific to Japan and the Philippine Islands, and between American and Asiatic ports. In the present time of international crisis it is vital to the defense of the United States that there be not even a temporary interruption in the management and operation of the American President Lines, Ltd. It is transporting military personnel and military supplies between the United States and Japan and Korea and is bringing to this country large quantities of strategic defense materials, such as rubber and tin, from the East Indies. In addition to these operations, the American President Lines, Ltd. is operating ten chartered ships exclusively for trans-Pacific operations to Japan and Korea on behalf of the Department of Defense.

3. The Dollar defendants are exerting every possible means to acquire voting control and control

of the management and affairs of American President Lines, Ltd. immediately without waiting for the disposition of this action, which will determine whether they or the United States is the true owner of the stock. If the Dollar defendants gain voting control of this stock *pendente lite*, they will immediately oust the present management, which has been operating the line for years in a highly efficient manner, and will install their own management, which has a history of inefficient and improvident conduct. The stock certificates are registered in the name of "United States Maritime Commission", a former agency of the United States, which was abolished as of May 24, 1950, by Presidential Reorganization Plan No. 21 of 1950 (15 F.R. 3178), and by that Plan the Secretary of Commerce is designated as the official representative of the United States with respect to its interest in this stock.

4. In order to protect the interests of the United States *pendente lite* and particularly in order to prevent disruption in the management and operation of the vital national defense functions being performed by American President Lines, Ltd., it is essential that the status quo be maintained so as to permit the existing management to continue in office during this litigation.

5. The granting of such temporary relief is essential to avoid irreparable injury to the United States and to the public welfare. On the other hand, such relief will not injure the Dollar defendants, since the present management, if left in office, will

continue to operate the line in the efficient manner which has brought about the line's present prosperous financial condition. Such efficient management would redound to the benefit of the Dollar defendants if it were ultimately determined that they are the true owners of the stock.

6. The Dollar defendants' claim of ownership to this stock is based upon the proceedings taken and judgments entered in an action brought by them in the United States District Court for the District of Columbia entitled *R. Stanley Dollar, et al., vs. Emory S. Land, et al.*, Civil Action No. 31468. The United States was not and could not have been made a party to that action, and hence is not bound or concluded by any judgments there entered, as was specifically held in that action by both the Supreme Court and the Court of Appeals for the District of Columbia Circuit. *Land vs. Dollar*, 330 U.S. 731, 736, 737, 739; Opinion of the Court of Appeals entered January 31, 1951, set forth as Exhibit "B" to the complaint in this action.

7. On March 16, 1951, the District Court for the District of Columbia entered an order in that action directing the Secretary of Commerce to turn over physical custody of the stock certificates to the Dollar defendants and to endorse said certificates and instruct American President Lines to register the Dollar defendants as the owners of record of said stock. In the event of the refusal of the Secretary of Commerce to do so, such action was ordered to be taken by the clerk of that district court. The

District Court refused the request of counsel for the Dollar defendants to require the Secretary of Commerce to execute a proxy in favor of them to vote said stock at the annual meeting of stockholders of American President Lines called for 2:00 p.m., March 19, 1951. The District Court also refused the request of counsel for the Dollar defendants that the Secretary of Commerce or the clerk of the Court be ordered to instruct American President Lines that the Dollar defendants are entitled to vote at the annual meeting of stockholders. A copy of the District Court's order of March 16, 1951 is attached to the affidavit of Donald B. MacGuineas, counsel for the Government, filed in support of this motion. Thus the District of Columbia Court, although ordering that the Dollar defendants be registered as owners of the stock, declined to decide who has the right to vote it. Defendant American President Lines is not a party to the District of Columbia action.

8. On March 16, 1951, the Secretary of Commerce turned over physical custody of the stock certificates to the Dollar defendants but refused to endorse the stock certificates and refused to instruct American President Lines to recognize the Dollars as the owners of the stock. On March 16, 1951 the defendants in that action and the Secretary of Commerce filed notices of appeal from this order of the District Court.

9. The Secretary of Commerce has executed a proxy to a representative of the United States to

vote this stock at the annual meeting on March 19, 1951 and the United States through its representatives proposes to vote this stock at the annual meeting and to take all other action consistent with its claim that it is the true owner of the stock.

10. As provided by the order of the District Court for the District of Columbia, the clerk of that Court has endorsed the certificates "United States Maritime Commission, by Harry M. Hull, Clerk of the United States District Court for the District of Columbia" and has sent American President Lines a telegram instructing it to register the Dollar defendants as owners of the stock. A copy of this telegram of the clerk is attached to the affidavit of Mr. MacGuineas.

11. The District of Columbia Court, in the action brought there by the Dollars, held after trial that the Dollars had in 1938 validly transferred outright ownership of the stock to the Government. *Dollar vs. Land*, 82 F. Supp. 919. The Court of Appeals reversed, holding that the transaction in 1938 was a pledge of the stock rather than an outright transfer. *Dollar vs. Land*, 184 F. (2d) 245. As stated above, that determination is not binding on the United States. It considers that decision a serious miscarriage of justice and for that reason has declined, by direction of the President, to acquiesce in it. By the action brought in this Court, the United States submits itself to this Court's jurisdiction for an adjudication of its rights in the stock.

12. Defendants Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco, are transfer agents and registrar of this stock, and the Dollars have also made demands upon them to be recognized as owners of the stock. Unless enjoined by this Court *pendente lite*, American President Lines and the transfer agents will yield to the demands of the Dollars to be recognized as owners of the stock, will register the Dollars as owners, who will then assume immediate control of the corporation and its management. For the reasons stated above, this would cause immediate and irreparable injury to the United States and to the public welfare and for that reason this preliminary injunction is sought to maintain the status quo *pendente lite*.

This motion is submitted on the verified complaint, supporting affidavits of E. L. Cochrane, Chairman Federal Maritime Board and head of the Maritime Administration, and of Donald B. MacGuineas, attorney for plaintiff, and supporting memorandum of points and authorities.

/s/ PHILIP H. ANGELL,

Special Assistant to the Attorney
General

/s/ DONALD B. MacGUINEAS,

Attorney, Department of Justice,
Attorneys for Plaintiff.

[Endorsed]: Filed March 19, 1951.

[Title of District Court and Cause No. 30407.]

SUMMARY OF DEFENDANTS' POINTS ON
MOTION FOR PRELIMINARY INJUNC-
TION AND ON MOTION FOR INSTRUC-
TIONS

* * * * *

In contrast to the foregoing, note what our adversaries—the United States and the officers of American President Lines, Ltd.—rely on. It is merely the statement in the opinion of the Supreme Court that the judgment to be rendered would not be *res judicata* of the United States. But all that this means is that, since the United States could not be made a party and therefore was not a party *eo nomine*, it may be at liberty to file a suit in its own name, just as any natural person might do in like circumstance to assert whatever right it might wish to assert, and in such a suit it could not be said, from the bare face of the judgment alone, that it is barred by the judgment on the threshold of the new suit.

But all this is irrelevant. For the purpose of the motions presently before the court, it may be assumed that the judgment is not *res judicata* as respects the United States. Nevertheless, the decisions of the Supreme Court and the Court of Appeals show that they have in fact decided that the Dollars never parted with title and that the United States never obtained title. Because of the technicalities of parties and of sovereign immunity from suit, the

courts could not “quiet title”, but they unquestionably did divest any and all agents of the government of any and all right to enjoy possession of the shares and to exercise any right to control the shares and what the shares represent. Nothing can alter that short of a final decree in the new suit, rendered after trial, sustaining its claim—a fantastic and unlikely result.*

The essence of the doctrine of *United States vs. Lee and Dollar vs. Land* is that, if a wronged citizen cannot reach the intangible entity known as the United States, he can effectively reach everyone through whom it can possibly act. In other words, what the judgment awarded to the plaintiffs in *Dollar vs. Land* was every right which the Secretary of Commerce claims or can claim to exercise for the United States. Anything less than that would be an emasculation of the judgment.

Yet in the instant case plaintiff seeks an injunction for the purpose of continuing to perpetrate what the Supreme Court has defined as unlawful possession of a tortfeasor. It seeks to maintain in control and possession those who rest and can rest

* The Supreme Court's statement concerning *res judicata* was made before the case was tried. Subsequently, facts occurred during the litigation, including the fact that the defendants were represented by the Attorney General and the interests of the United States were asserted. In due course and at a proper time we shall submit that these facts render the decision *res judicata*. In due course we shall also present a motion for summary judgment, as well as a motion to dismiss.

solely on Mr. Sawyer's exercise of alleged rights in defiance of the judgment.

* * * * *

Dated: April 2, 1951.

HERMAN PHLEGER,
GREGORY A. HARRISON,
MOSES LASKY,
ALVIN J. ROCKWELL,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Dollar Defendants

[Endorsed]: Filed April 2, 1951.

[Title of District Court and Cause No. 30407.]

REPORTER'S TRANSCRIPT OF ARGUMENT
ON MOTION FOR PRELIMINARY IN-
JUNCTION; MOTION FOR ORDER OF
INSTRUCTIONS

Monday, March 26, 1951

Before Hon. George B. Harris, Judge.

Appearances: For the United States of America:
Donald B. MacGuineas, Esq., Special Assistant to
the Attorney General, and Philip H. Angell, Esq.,
Special Assistant to the Attorney-General.

For the Defendants, Robert Dollar, et al.: Messrs.
Brobeck, Phleger & Harrison, by Gregory Harri-
son, Esq., and Moses Laskey, Esq.

For the American President Lines, Ltd.: Arthur Dunne, Esq.

For a Group of Minority Stockholders: Warner W. Gardner, Esq.

The Clerk: United States of America vs. Dollar.

Mr. Angell: If Your Honor please, at this time I would like to move that permission be granted to Mr. Donald B. MacGuineas to appear as attorney in this particular case, United States vs. Robert Dollar, No. 30407, pursuant to Rule 1 (d) of the Rules of the District Court for the Northern District of California, and that the minutes of the Court show such permission has been granted, Mr. MacGuineas appearing for the Government.

The Court: That may be the order as to Mr. MacGuineas.

Mr. Edward G. Chandler: Your Honor, may I also move at this time the admission solely for the purpose of this suit of Warner W. Gardner, a member in good standing of the Bar of the Supreme Court of the United States, the District of Columbia, and the State of New York.

The Court: For whom does he appear?

Mr. Chandler: Mr. Gardner appears on behalf of the minority stockholders in their application to file a memorandum in this case.

The Court: All right. Are there any other appearances before we take up the matter?

Mr. Dunne: Before Mr. MacGuineas begins, I shall offer for filing and have handed to counsel for all the parties involved here a supplemental affidavit

of the Secretary of the American President Lines, Ltd., about certain stock ledger entries so that if it becomes important the Court may have before it the exact form of the entries.

* * * * *

Mr. MacGuineas: The case then went back to the District Court for trial. Much evidence was adduced by both sides of surrounding circumstances with respect to this transaction, the Government, of course, asserting that it was an outright transfer of absolute title, and the defendants asserting that it was merely a pledge. The District Court—and that is the only Court which has ever passed on the live record in this case—held that the Dollars had transferred their title to the Government outright and dismissed the complaint. That is reported in *Dollar vs. Land*, 82 Fed. Supp. 919. The Court of Appeals considering that because the record was in large part documentary, it was entitled to place its own construction upon the record and make its own findings of the essential factual issue, reversed and held that it considered or held that it was a pledge rather than an outright sale. That is *Dollar vs. Land*, 184 Fed. (2) 245. The Supreme Court denied certiorari, 340 U.S. 884.

* * * * *

In that connection I should like to make it plain to Your Honor that the United States is filing this suit not in any sense as being a grudging loser or that it has any feuds or axes to grind against anyone. The United States has filed this suit because

the Attorney General and his subordinates in the Department of Justice are firmly of the mind that the conclusion of the Court of Appeals that this stock had been pledged was a serious miscarriage of justice and I, speaking on behalf of the Attorney General, affirm that before Your Honor today, and it is only because that is our sincere professional belief that we are before Your Honor today. And furthermore this case will be tried on a new level. Counsel for the Dollars has asserted that all of the facts have been put into evidence in the District of Columbia proceedings. Nothing new could be presented. It would be merely a rehash of the same old thing. That, Your Honor, is not the case. Either party on the trial of this action will be free to adduce such new evidence as it chooses, and I assert to Your Honor right now the Government has new evidence not presented in the District of Columbia action which it will present upon the trial of this case.

* * * * *

Mr. Harrison: If Your Honor pleases, having now traced the course of this litigation up to this point, we wish to state to the Court the grounds upon which we oppose the motion for a preliminary injunction as now at law. In the first place, as shown in our memorandum and we think citation is hardly needed, as the citations show it is a cardinal principle of equity, of jurisprudence that a court will never entertain a motion for preliminary injunction based upon a complaint which, to say the least, is of doubtful validity.

Now, in this particular case we have the unusual situation where there can be no question that the complaint will be found to be without merit. It would indeed be astounding if it was found to have any merit, because even conceding as counsel contends, that because of the statements appearing in various opinions that a decision of this kind is not *res judicata* as against the United States, he may file a suit and that it may not be arrested and dismissed at its very threshold, the fact still remains that where a suit of this character is filed which asserts that the United States Government acquired title by virtue of a contract, the Adjustment Agreement of August 15, 1938, whereby the then owners transferred title and did not create a pledge, and in which complaint it affirmatively appears that this very question of law has been considered and passed upon throughout the entire hierarchy of the federal judiciary, it becomes evident upon its face that the complaint can not be expected to have any merit whatever.

As a matter of fact, in his written memorandum of reply filed in the course of argument here, counsel for the plaintiffs states that this suit is an attempt to relitigate the very question involved in *Dollar against Land*. Now, grant that counsel is entitled as a matter of law to file his complaint, grant that he is entitled to maintain it until we can get around to the appropriate summary motions, still this Court is not expected, I trust, to shut its eyes to the decisions of the District of Columbia and the Appellate Courts flatly holding that this agreement

is a pledge and nothing more, clearly holding that the plaintiffs in that case never transferred any title to the United States. And certainly as to that particular transaction, no one except the United States can question the effectiveness of that judgment.

There is a suggestion—not in the complaint, if you please, but in the argument of counsel—that the government has discovered new evidence. I am sorry to say that I can not place any real credence in that statement, because if the Government has just discovered evidence some thirteen years after the transaction occurred, after five and a half years of litigation, in which every scrap of evidence known to either party was presumably examined, if still the government is not aware of what the evidence in the case may be, it would reflect such gross incompetence in public office as to be unbelievable.

* * * * *

Mr. MacGuineas:

“I and Mr. Philip H. Angell of San Francisco appear at this meeting as counsel for the United States as the true and lawful owner of the stock” and so forth.

“On behalf of the United States I assert that the United States is the true and lawful owner of those shares and that it is lawfully entitled to vote those shares at this meeting.”

Now, if the Supreme Court decision in the Dollar case means what it says, and I take it does mean what it says, it means that the United States stands unembarrassed by those proceedings with the lawful right and privilege to assert its claim of owner-

ship of that stock. Now, how can the United States do that? Like any other corporation, it must perforce act through agents. One of those agents is the Secretary of Commerce. Another agent is the Attorney General and his subordinates in the Department of Justice. And in the beginning with the filing of the complaint in this suit those agents have taken and have acted as agents of the United States, asserting the right of the United States as owner of the stock. Mr. Harrison would have you believe that we are all stooges, if I may use the term, of the Secretary of Commerce. I submit that we are the lawfully authorized representatives of the United States of America to assert the claim of the United States in this action and every demand which has been made upon A.P.L. and upon the Dollars has been made by us expressly in the name of the United States and as asserting the United States ownership of this stock.

Mr. Harrison, in his argument yesterday, referred to civil appeals taken in the District of Columbia proceedings. The fact is to date Mr. Harrison has taken two appeals to the Court of Appeals, and we have taken two appeals to the Court of Appeals.

The Court: What were those two appeals, counsel, so I will have them in mind?

Mr. MacGuineas: Yes. The first appeal was taken by Mr. Harrison when the District Court dismissed his complaint. The second appeal was taken by Mr. Harrison, when the District Court, after trial of

the case, held that the United States was the owner of the stock.

The Court: That was from Judge McGuire's original decision?

Mr. MacGuineas: His decision after trial, correct, your Honor.

The Court: By the way, did you participate in the trial of that case, counsel?

Mr. MacGuineas: Yes. I was present in the trial of that case, your Honor. Do you want to know also about the Government's appeals?

The Court: Yes.

Mr. MacGuineas: The first appeal taken by the defendants and by the Secretary of Commerce, appearing specially without submitting himself to the jurisdiction of the Court, and by the United States appearing specially and without submitting himself to the jurisdiction of the Court, was from the final order and judgment of District Judge McGuire in which he purported to adjudicate title of the Government.

* * * * *

The Court: Mr. Harrison, will you pardon the interruption?

Mr. Harrison: Yes, Your Honor.

The Court: You have lived with the language of these cases so long and so earnestly that they have become part of your career. I am meeting the impact for the first time naturally and I wonder what

construction or what reaction, what explanation you have to this language of the Court of Appeals more recently referred to by Mr. Dunne in the course of his argument. This is *Land vs. Dollar*, the Court decision of March 12th, 1951:

“The result then inescapable from the very nature of the controversy is paradoxical. In an action between a private individual and a public official the Court decides that the United States has no interest in the property involved, so the action will lie. But the ensuing judgment is effective only as to the parties before the Court and is not res judicata against the United States, not a party.”

Mr. Harrison: Yes, Your Honor. The meaning of that language, and the language which follows in the form of the judgment, explain it.

The Court: Paragraph two is later changed or emasculated and other language inserted by the Court.

Mr. Harrison: Yes, Your Honor.

The Court: All right.

Mr. Harrison: By the way I think I gave the Court my second copy of that. May I borrow it momentarily?

The Court: The second copy of what?

Mr. Harrison: The last decision of the Court of Appeals. Thank you. The meaning of the language used by the Court is that since suit cannot be main-

tained against the United States without its consent, and it is not a necessary party, and is therefore not joined in the litigation, that a judgment as between the parties to the litigation will be rendered and will be effective as to them and as to all holding as officers of the United States, but it is permissible for the United States, after such a judgment, to institute an action if the right exists, just as any private party not joined in such a suit would be entitled to institute an action, and at the threshold of that action it would not necessarily be true that the suit would be dismissed on the ground of *res judicata*. That suit has been filed here, and when this comes before the Trial Judge, whether it be yourself or one of your associates, we will in fact argue, as we did, a question not decided by the Court of Appeals, that in fact it is *res judicata* in this case because of the fact that Mr. MacGuineas and his associates defended this case for the Government from beginning to end. We will argue furthermore, as I already did, that the law of the case, that is, the law with respect to the contract, will govern the case, and that the plaintiff cannot prevail.

* * * * *

In this particular case, then, the United States here may maintain this suit if it is a suit which any person, natural—any natural or other person could maintain with respect to the title of this property, and no other suit can it maintain. This suit then becomes a suit of one who seeks to recover per-

sonal property from another which will be successfully maintained only if upon motion to dismiss the rights of the plaintiff can be asserted under the law, and in this case when we come to a motion which we will present to the Court, we will represent to the Court, No. 1, that it should be dismissed because there is *res judicata* in this case, since the Government has defended the case from beginning to end, and because there is a final judgment. We will assert the law as determined by the highest Courts of this land. They have determined the meaning of this contract to be a pledge and not a sale, and it will be binding upon this Court. And we will show the Court that the only evidence material to any question which could possibly be presented is the evidence which has already been presented in the District of Columbia, and the case will then, we believe, be dismissed. But in the meantime there is certainly no authority anywhere in United States against Lee, or in any other case for the proposition that the judgment having been rendered in favor of the Dollar defendants in the suit in the District of Columbia anyone can then step forward and, speaking for the United States, no matter how high the position he may hold, arrest its execution.

* * * * *

In the District Court of the United States for the Northern District of California, Southern Division

No. 30428

R. STANLEY DOLLAR, et al.,

Plaintiffs,

vs.

EMORY S. LAND, et al.,

Defendants.

(No. 31468 on the files and records of the United States District Court for the District of Columbia registered herein on March 19, 1951 under provisions of Section 1963 of Title 28 U.S. Code.)

In the Matter of the Application of

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, a corporation, THE ROBERT DOLLAR CO., a corporation, and H. M. LORBER,

Petitioners,

in proceedings supplementary to final judgment for orders enforcing final judgment; and for the issuance of an order to show cause in civil contempt against

Donald B. MacGuineas, Ralph K. Davies, George L. Killion, M. J. Buckley, Paul E. Hoover, Arthur B. Poole, Paul D. Page, Jr., A. J. Williams, Wells Fargo Bank & Union Trust Co., a corporation, Joseph A. Tognetti, A. B. Dunne, Lloyd C. Fleming, T. L. Eliot, E. E. Mann, and American President Lines, Ltd., a corporation,

Respondents

DEPOSITION OF DONALD B. MacGUINEAS

Be it remembered that, pursuant to notice given in Proceedings No. 30428 in the United States District Court for the Northern District of California, and pursuant to oral stipulation that the time and place may be as of this hour and at this place, [1] and on Saturday, the 31st day of March 1951, at the hour of 11:00 A. M. Thereof, at the Board of Directors' Room, 11th Floor, 311 California Street, San Francisco 4, California, before me, Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Donald B. MacGuineas, one of the respondents herein, produced as a witness on behalf of the petitioners, who, being by me first duly cautioned and sworn at the hour of 10:10 A.M., the 30th day of March 1951, prior to the taking of deposition of Respondent George L. Killion in the within cause, was examined and interrogated as a witness in said cause.

Brobeck, Phleger & Harrison, by Moses Lasky, Esq., 111 Sutter Street, San Francisco 4, California, appeared on behalf of the petitioners.

Arthur B. Dunne, Esq., 333 Montgomery Street, San Francisco 4, California, appeared on behalf of Respondents Ralph K. Davies, George L. Killion, M. J. Buckley, Arthur B. Poole, Joseph A. Tognetti, A. B. Dunne, T. L. Eliot, E. E. Mann, and American President Lines, Ltd.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Donald B. MacGuineas.)

Donald B. MacGuineas, Esq., and Phillip H. Angell, Esq., appeared on behalf of Respondents Paul D. Page, Jr., A. J. Williams, Lloyd C. Fleming, and Donald B. MacGuineas.

Edward V. Mills, Jr., Esq., 333 Montgomery Street, San Francisco 4, California, appeared on behalf of Respondent A. B. Dunne. [2]

Chickering & Gregory, by Frederick M. Fisk, Esq., 111 Sutter Street, San Francisco 4, California, appeared on behalf of Respondent Paul E. Hoover.

Heller, Ehrman, White & McAuliffe, by F. W. Tenney, Esq., 14 Montgomery Street, San Francisco 4, California, appeared on behalf of Respondent Wells Fargo Bank & Union Trust Co.

It was stipulated between counsel for the respective parties that the Notary Public, after cautioning and administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel in the absence of the Notary Public, it shall be deemed that the Notary Public has instructed the witness to answer but that he still refuses so to do.

It was further stipulated that said deposition shall be reported in stenotypy by Grace Telenius Davis, a competent official reporter and disinterested person, and thereafter transcribed by her into longhand typewriting, to be read to or by said witness, who, after making such corrections therein as are necessary, will subscribe to same.

Mr. Dunne: If we may go back on the record,

(Deposition of Donald B. MacGuineas.)

we can make this part of the record of Mr. MacGuineas' deposition—That is M-a-c-G-u-i-n-e-a-s. [3]

I have here photostatic copies that Mr. Bradley has handed to me. I give you two copies, Mr. Lasky; copy to Mr. Fisk; copy to Mr. Tenney.

Mr. Tenney: Thank you.

Mr. Dunne: And Mr. Angell. And Mr. Lasky, I wish you would look those through before Monday morning or very early Monday morning and indicate to me whether they got them all or not or if there are any missing.

Mr. Lasky: All right, we will do that.

Mr. Dunne: Now, Mr. Bradley, we would also like to have photostated and have available by Monday morning if we can on the deposition of Mr. Killion the Petitioners' Exhibit No. 11, which is this brief; Petitioners' Exhibit No. 9, which is this Department of Justice release of November 28, 1950; Petitioners' Exhibit No. 10, carbon copy of a letter purporting to be written and was written by Mr. Killion to Admiral Cochrane; and on the deposition of Mr. Davies, Petitioners' Exhibit 1, a letter of February 19, 1951. If you would be good enough to make the same number of copies in the same way, with the one black, and then the others on white.

Mr. Lasky: Just glancing at these right now, it seems to me that there are omitted Exhibits 1 and 2, proxy of 1947 and the ballot cast. What we have here seems to start in '48.

Mr. Dunne: I didn't think we had the '47 file.

Mr. Fisk: I don't remember 1947. [4]

Mr. Lasky: There was this election of August

(Deposition of Donald B. MacGuineas.)

12th when Mr. Killion was first elected. It was a special meeting.

Mr. Fisk: I didn't see '47. I remember noticing '48 and '49.

Mr. Lasky: It was Exhibit No. 1.

Mr. Dunne: Yes, Mr. Lasky is correct. Exhibits Nos. 1 and 2 for identification had to do with the meeting in '47.

Mr. Lasky: On page 14 I say: "Let's make some photostats . . ."

Mr. Dunne: You don't have to argue. I agree with you and I will get them.

Mr. Lasky: All right.

Those were Mr. Killion's birth throes, and I would like to have them.

Mr. Dunne: That was proxy and ballot, wasn't it?

Mr. Lasky: Proxy and ballot.

This is all off the record, this discussion about exhibits, isn't it? Do you want this to be on the record?

Mr. Dunne: Yes, I wanted to indicate what we were giving to you and I think that that was what we were concerned with, and I think we might get on the record what it is.

You can't do anything about those, Mr. Bradley, because Mr. Tognetti has those and I will have to get in touch with him the first thing Monday morning on getting those.

Now, Mr. Lasky, offhand do you notice anything else? [5]

If you can let me know first thing Monday morning, that will be time enough.

(Deposition of Donald B. MacGuineas.)

Mr. Lasky: All right, we can do that. It seems to be here, but I am not sure.

Mr. Dunne: Thank you very much, Mr. Bradley.

Mr. Lasky: Can we now put Mr. MacGuineas in a position where he can't object to questions?

Mr. Dunne: No, he will probably still object.

Mr. MacGuineas: I think I still can, Mr. Lasky; I have two counsel in this hearing—Mr. Angell and Mr. MacGuineas.

Mr. Lasky: But you don't trust Mr. Angell to make the proper objections?

Mr. MacGuineas: I trust him implicitly.

Mr. Lasky: The record should show of course that Mr. MacGuineas has already been sworn.

Mr. Dunne: Correct.

Mr. Lasky: That ought to have been done in Mr. Davies' deposition too.

Mr. Dunne: Yes, and it may be added or we can agree by stipulation in this deposition that that is the fact, he was sworn. I don't know—maybe the transcript shows that.

Mr. Fisk: The transcript shows that.

Mr. Lasky: The transcript of Mr. Killion's deposition. It ought to go into the transcript of Mr. Davies' deposition.

The Reporter: Excuse me, Mr. Lasky, but Mr. Conklin and I were discussing that matter and it was decided to show that [6] Mr. Davies had been previously sworn and Mr. MacGuineas likewise would be shown in that manner.

Mr. Lasky: That is all right.

(Deposition of Donald B. MacGuineas)

Direct Examination

Q. (By Mr. Lasky): Mr. MacGuineas, what is your occupation?

A. I am an attorney in the United States Department of Justice; have been such since approximately May, 1942.

Q. Headquarters in Washington, D. C.?

A. Right. Official station is Washington, D. C.

Q. Who is your superior?

A. I have several superiors in the Department of Justice.

Q. Who is your immediate superior?

A. Mr. Edward H. Hickey.

Q. Then going up through the chain of command, will you trace it through to the——

A. Mr. Newell A. Clapp.

Q. Will you state the positions occupied by those gentlemen?

A. It will be a little difficult because they have made some shifts in position during the course of this litigation, but in general it is this: Mr. Hickey during the course of *Dollar v. Land*—— I take it that is the subject of your interest ?

Q. Yes.

A. ——was the Chief of the general litigation section of the Claims Division in the Department of Justice. I am an attorney attached to that section. Mr. Newell A. Clapp, until quite recently, was the First Assistant in the Claims [7] Division. Within the last two months he has either transferred officially or is about to transfer officially to

(Deposition of Donald B. MacGuineas)

a position in the Anti-Trust Division, that during—up to the present, as far as I have been informed, he has been serving for the last few months as the Acting Head of the Claims Division. Up until the last few months, the Assistant Attorney General in charge of the Claims Division, the head of that Division, has been Mr. Graham H. Morison—that is one “r.” Within the last few months Mr. Morison has been appointed Assistant Attorney General in charge of the Anti-Trust Division. And since Mr. Morison has transferred his activities to the Anti-Trust Division, as I said, Mr. Clapp has been the acting head of the Claims Division.

Above the Claims Division is Mr. Peyton Ford, formerly called the Assistant to the Attorney General, but some months ago his title was changed to Deputy Attorney General. He is in effect the First Assistant to the Attorney General.

Above Mr. Peyton Ford is the Attorney General himself.

It will perhaps be helpful to explain the relationship of the Solicitor General and his office. By law the Solicitor General is charged with the responsibility for all Appellate work handled by the Department of Justice, whereas the Divisions, of which the Claims Division is one, are responsible for the cases at the trial court level, those cases within the jurisdiction of that particular division.

Q. And in the Court of Appeals?

A. The Division such as the Claims Division acts in the Court of Appeals only pursuant [8] to as-

(Deposition of Donald B. MacGuineas)

signment and delegation from the Solicitor General.

Q. Well now, had you finished your answer?

A. Yes.

Q. Now, Mr. MacGuineas, in your capacity of attorney in the Department of Justice, you were one of the counsel who tried the case of *Dollar v. Land* in the United States District Court for the District of Columbia, were you not?

A. Yes; I was not chief counsel; I attended the trial.

Q. And you assisted Mr. Melvin Siegel?

A. That is correct.

Q. Who was also an attorney in the Department of Justice? A. Correct.

Q. And when the case came up in the United States Court of Appeals, it was briefed and then argued early in 1950—Mr. Siegel had left the Department and you wrote the briefs on behalf of the defendants, did you not? A. I did.

Q. And you personally argued the case in the Court of Appeals? A. I did.

Q. Then when a petition for certiorari was filed in the United States Supreme Court in October of 1950 under the name of the Solicitor General, did you have anything to do with that petition?

A. Do you have a copy of that petition at hand, Mr. Lasky? It will refresh my memory.

Q. No, I do not have a copy here.

A. At this time I am unable to state definitely whether or not I prepared a first draft of that petition. It is the frequent practice in the Department

(Deposition of Donald B. MacGuineas)
of Justice for the Solicitor General's Office to request the division which has handled the case below to prepare [9] a draft for submission to the Solicitor General. Whether I did that in that particular case, I am unable to recall at this moment.

Q. When the case went down to the District Court again in November of 1950 on the mandate of the Court of Appeals, you were one of the attorneys who represented the defendants in the District Court. A. I was one.

Q. Along with Mr. Hickey? A. Correct.

Q. And with Mr. Clapp? A. Correct.

Q. And the three of you also were attorneys for Mr. Sawyer in the proceedings?

A. We were counsel for Charles Sawyer, Secretary of Commerce, appearing specially in those proceedings, without submitting himself to the jurisdiction of the Court.

Q. I didn't ask you whether you thought you had not submitted yourself. You were attorneys for Mr. Sawyer?

A. I am indicating the respect in which I was attorney for Charles Sawyer, Secretary of Commerce.

Q. Well, we don't agree with your attempt to limit the capacity in which you appeared. The physical fact is you were attorney for Mr. Sawyer and in whatever capacity.

Mr. Angell: I submit he has answered the question. He appeared specially.

Mr. Lasky: Mr. Angell, no matter what he says

(Deposition of Donald B. MacGuineas)

or claims, he cannot alter the legal situation, and we are not allowing the deposition to go unquestioned.

Mr. Angell: You can question him, but you can't make him change his answer.

Mr. Lasky: I can certainly protest when an answer is not responsive.

Mr. Angell: Go ahead and protest.

Q. (By Mr. Lasky): In whatever capacity you appeared on behalf of Mr. Sawyer, you and Mr. Clapp and Mr. Hickey were the attorneys who did so appear? A. We appeared.

Q. Can't you answer that Yes or No, please?

A. No, I cannot. We appeared for Charles Sawyer, Secretary of Commerce, in the respects shown in the record in that case.

Q. And you and Mr. Hickey and Mr. Clapp also appeared as attorneys for the United States in the respects shown by the record in that case?

A. We did.

Q. All right. And then——

Mr. Dunne: That simplifies that.

Mr. Lasky: Yes.

Q. (By Mr. Lasky): Then on the appeals back up to the Court of Appeals taken in December of that year, you and Mr. Hickey and Mr. Clapp appeared as attorneys for the defendants?

A. You mean Emory S. Land, et al.?

Q. Yes. A. We did.

Q. And you also appeared as attorneys for Mr. Sawyer in the respects shown by the record in that case? A. We did.

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Q. And you also appeared as the attorneys for the United States in the respects in which the United States appeared as shown by [11] the record in that case? A. We did.

Q. Thereafter, when the petitions for writs of certiorari were filed in the United States Supreme Court under the No. 552 and in the name of the Solicitor General as counsel, did you have anything to do with that?

A. Under instructions from my superiors I prepared a first draft of the petition for certiorari.

Q. And was that draft altered and changed by the Solicitor General before filing?

A. It was.

Q. And you will recall also that a petition for re-hearing was filed under the number of 353. Did you prepare that petition for re-hearing or first draft?

A. To the best of my present recollection, I did not prepare a draft of that.

Q. Now, in this various activity which you have described and in which you engaged during the course of that litigation, who assigned you to the tasks?

A. When Mr. Melvin Siegel left the Department, which was approximately December, 1949, my superiors, Mr. Clapp and Mr. Hickey, made a general assignment of the case of *Dollar v. Land* to me. Ever since that time I have acted under that general assignment as the attorney primarily responsible for the conduct of that litigation, subject, of course, to

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frequent consultations, frequent advice, frequent instructions, from my superiors, chiefly Mr. Clapp, to a lesser extent, Mr. Hickey, to a lesser extent, Mr. Graham Morison, to a lesser extent, Mr. Peyton Ford.

Q. And you have acted then as attorney in the Department of [12] Justice of the United States?

A. Entirely. I have never acted—I have never done anything in connection with that litigation except in my official capacity as an attorney in the Department of Justice pursuant to instructions from my superior officers.

Q. And I assume you have been wholly compensated as an attorney in the Department of Justice from the Federal Treasury?

A. I have been compensated. I don't know what you mean by "wholly."

Q. Your compensation has been your salary in the Department?

A. If you mean that I have not received any compensation from any other source than the Department of Justice, the answer is Yes.

Q. Do you know by what authority the Department of Justice assigned you to handle that case on behalf of the defendants Land, et al.?

Mr. Dunne: That obviously calls for legal conclusion.

Mr. Angell: It is a matter of law.

The Witness: Well——

Mr. Angell: What is that?

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The Witness: If my counsel doesn't object, I think it might be helpful for me to answer.

Mr. Angell: I have no objection. It might help the record.

The Witness: Yes. It has been for many years, as far as I know, extending back to the very beginning of the Department [13] of Justice, the consistent practice of that Department to appear in litigation and to represent officers or employees of the United States who are sued with respect to matters or action taken by them under color of office. It is therefore my belief that I was assigned to represent Mr. Emory S. Land, et al., in that litigation in accordance with that consistent practice which runs at least as far back as the case of the United States v. Lee, with which you are familiar, which was decided, I think, in 1883 or thereabouts.

Q. (By Mr. Lasky): Who paid the various costs and expenses of the Dollar v. Land litigation incurred on the defendants' side?

A. I have no personal knowledge of that. I do not handle the payment of any costs of litigation.

Q. Now, do you recall at December 8, 1950 you appeared before Judge Matthew F. McGuire in the United States District Court in the District of Columbia in Dollar v. Land, on proceedings on motion of the plaintiffs to enter judgment on the mandate of the Court of Appeals, for Charles Sawyer as party defendant, et cetera?

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A. I did. Pardon me, may I have that question again?

(Last question read.)

The Witness: At that time I appeared before Judge McGuire as counsel for Charles Sawyer, appearing specially in the respects indicated by the record in that case.

Q. (By Mr. Lasky): Well, you were also there on behalf of the defendants, were you not?

A. I also appeared as [14] counsel for the defendants, Land, et al.

Q. Yes, Do you recall saying at that time that the possibilities of instituting a suit in the name of the United States against Dollar and associates, in which the United States would assert its title, were then under exploration?

A. I made a statement to that effect; whether those are my precise words, I could not now state.

Q. Yes. Now at that time by whom were those possibilities being explored?

A. They were then being explored by me, by Mr. Hickey, and by Mr. Clapp. Whether they were then also being explored by still higher officers in the Department of Justice, I have no present recollection.

Q. Under whose instructions or request were you making the exploration?

A. Well, I was acting under my general assignment about which I have previously testified. You

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will appreciate that in a case of this magnitude I would be discussing procedure, tactics, policies, almost every day with one or another of my superiors in the Department.

Q. When did this exploration of the possibility of such a suit begin?

A. I could not be more specific than sometime prior to December 8, which I believe is the day on which I made the statement to Judge McGuire.

Q. "Sometime prior" might go clear back to November, 1945.

A. I can say that to the best of my knowledge there was no exploration in November, 1945.

Q. Well, when did you first begin exploring it? When did anyone [15] in the Department so far as you know first begin exploring it?

A. The best I can say is shortly before December 8th.

Q. And after the Supreme Court had denied petition for writ of certiorari on November 13, 1950?

A. I could not say whether any consideration had been given to that question before November 13, 1950, or not.

Q. Certainly no serious consideration. Is that a fair statement?

A. Well, I think what would be a fair statement would be that the issue as to the United States bringing a suit would not be immediate until it became known that the Supreme Court denied certiorari.

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Q. After the Supreme Court denied certiorari, when did you gentlemen in the Department of Justice decide that that was not to be the end of the case or the controversy?

A. Well, as I recall it, after the Supreme Court denied certiorari, a few days later the mandate of the Court of Appeals went back to Judge McGuire in the District Court. You and Mr. Harrison had written us, as I recall it, that you proposed—First, you submitted a draft form on the final judgment, as I recall it, and inquired as to whether that met with the approval of the Department of Justice. As I recall it, you were informed that it did not. I believe you shortly thereafter informed us in the Department that you were going to make a motion for final judgment before Judge McGuire. That was a further step in the case, which of course I and my superiors of the Department of Justice would handle just as we had handled [16] all previous steps in the case.

Q. Well now, you refer to a letter in reply to Mr. Harrison and me. Now, what the letter said, if you will recall—Pardon me, did you write the letter? It was over Mr. Clapp's signature. Did you write it?

A. It is likely that I did. You can ascertain by having the original letter and if it has my initials in the upper left-hand corner, I did, but the chances are that I did write it.

Q. Well, the letter said that you were, in effect, considering the subject whether the judgment was

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all right. Now you have referred to United States v. Lee. Have you had experience with other cases which were brought against men who were or occupied official position in the government under the doctrine of that case?

A. Well, by experience you mean "Have I read of other cases"?

Q. Participated in them.

A. Well, I have been counsel in my official capacity as an attorney in the Department of Justice in a substantial number of other cases where a government officer was named defendant in a suit and was charged with the performance under color of office or some act which was alleged by the plaintiff to be wrongful or arbitrary or illegal, and such cases I, acting pursuant to instructions, have defended.

Q. Do you know of any case wherein after a judgment in favor of the plaintiffs, the Department of Justice has not accepted it as a final determination of the controversy up to this case of Dollar v. Land? [17]

Mr. Angell: I object to that as incompetent, irrelevant and immaterial; not within the issues of this case; calls for legal conclusions as to what the nature of this action is. The action speaks for itself.

Mr. Lasky: Well, the objection is noted. The witness answers the question unless he or you instruct him not to.

Mr. Angell: Read the question again.

(Question read.)

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Mr. Angell: Assumes a fact not in evidence, and I instruct the witness not to answer.

Q. (By Mr. Lasky): You decline to answer, Mr. MacGuineas?

A. Well, unless my counsel——

Mr. Angell: If you want to answer.

A. —advises me to the contrary, I am willing to answer it.

Mr. Angell: I withdraw my objection.

The Witness: I think it might clarify the situation if I do.

Mr. Angell: Go ahead. I withdraw my instruction.

The Witness: Yes. I myself have no personal knowledge of another case in which there has been pursued the precise course of litigation that has been pursued here. On the other hand, I have not researched the problem to determine whether or not there have been such cases, so I cannot say whether or not there have been.

Q. (By Mr. Lasky): Well now, have you finished your answer? A. Yes. [18]

Q. Mr. MacGuineas, can you tell me just when your people in the Department of Justice determined that judgment for the plaintiffs in the case of Dollar v. Land was not to be determinative so far as you were concerned of the rights of the parties and that you would litigate or seek to litigate the matter further?

A. Now, as I get your question, it involves two questions: One, when did we determine that judg-

(Deposition of Donald B. MacGuineas)

ment for plaintiffs would not be determinative of the rights of the parties?

Q. So far as you people were concerned.

A. Yes. And two, when did we decide to litigate it further?

Q. Yes.

A. Now, to answer your first question: It has been the position of the Department of Justice from the very day in which the case of *Dollar v. Land* was instituted in, I think, November, 1945, that any judgment rendered in that action would not and could not be binding upon or affect any rights of the United States as the claimed owner of the stock.

Q. Well now, you are speaking of the Department of Justice clear back to 1945?

A. That is my understanding.

Q. You didn't come into the case until a later date?

A. No, that is what I would call background information which I learned when I came into the case.

Q. All right.

A. Now the second question, as I understand it, was: When was it determined to file the particular action that was filed, No. 30407? Is that your question?

Q. Yes, *United States v. Dollar*.

A. Yes. The actual [19] determination to file that suit was transmitted to me over the telephone when I was here in San Francisco, by Mr. Clapp from Washington, D. C., at approximately 9:30

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a.m. San Francisco time on the morning that the Supreme Court denied certiorari.

Q. March 12? A. March 12.

Q. 1951? A. March 12.

Q. Now, Mr. MacGuineas, you arrived in San Francisco at an earlier date than March 12, did you not?

A. I arrived in San Francisco 10:00 p.m. San Francisco time the preceding Saturday, which would be March 10, I believe.

Q. And when you arrived here in San Francisco on the preceding Saturday you had in your possession the draft of a complaint in *United States v. Dollar*, which was later filed as No.—

Mr. Angell: 30407.

Q. (By Mr. Lasky): All right. A. I did.

Q. And at that time, that complaint already bore the signature of Mr. Newell Clapp, did it not?

A. It did.

Q. And of Mr. Hickey? A. It did.

Q. And your own? A. It did.

Q. And it had a blank space in there for insertion of the date on which the Supreme Court denied certiorari? A. It did.

Q. How long prior to March 12 had that complaint been prepared?

A. I would say sometime in the early part of the week before I arrived in San Francisco, which would be—

Q. The week beginning March 5th?

A. Yes.

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Q. Or March 4th?

A. Sometime the early part of the [20] week beginning March 5th.

Q. And how long prior to that time had you been engaged in preparing it? Let me withdraw the question for a moment. You did personally prepare it? A. I did.

Q. How long prior to March 5th had you been engaged in preparing it?

A. When I say I "prepared" it, it is true I drafted it. I then submitted it to my superior officers; they made certain changes in it, and it was then typed in the form in which it was later filed.

Q. When did you start that endeavor of its preparation?

A. Well, speaking roughly only, I would say perhaps two weeks prior to the week beginning March 5th, maybe ten days; something like that.

Q. Then you didn't start on that job until certainly after the Court of Appeals had acted in dismissing appeals, et cetera, on January 31, 1951?

A. By "that job", you mean the actual drafting of a complaint?

Q. Yes. A. That is correct.

Q. And although on December 8, 1950, you had stated before Judge McGuire that the possibilities of filing such a suit were being explored, you didn't get around to doing anything about drafting the complaint until at least a month or two months thereafter, is that right?

A. I—No, I don't say that I had not gotten

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around to doing anything about drafting a complaint. I said that I had not drafted the complaint prior to the date which I indicated. [21]

Q. Now, when you arrived in—when you left Washington—you had been instructed by your superiors, had you not, that the complaint was not to be filed until you received further instructions?

A. That is correct.

Q. And were you also advised that the complaint was not to be filed in San Francisco in the name of the United States if the Supreme Court should grant a writ of certiorari in the case then pending before it and in the Dollar v. Land litigation?

A. I have no recollection of receiving a specific instruction on that. My instruction was that I would be communicated with by telephone.

Q. Well, if not a specific instruction, had the subject not been discussed between you or among you and Mr. Hickey and Mr. Clapp? A. Yes.

Q. And isn't that the gist of the conversation, that you were to go to San Francisco with the complaint, but not file it unless the Supreme Court should deny certiorari?

A. No. My instructions and my conversation was that I was to come to San Francisco with the complaint, be prepared to file it, and await instructions by telephone when I was here.

Q. And you were left with the understanding from these conversations that even though the Su-

(Deposition of Donald B. MacGuineas)

preme Court granted certiorari, you might be filing that complaint?

A. No, I did not say that I was left with that understanding.

Q. Well, what understanding were you left with as the result of these conversations with your superiors?

A. The understanding [22] to which I have testified.

Q. Was it an understanding that in the event the Supreme Court did grant certiorari, that complaint would not be filed out here?

A. To my knowledge a definitive determination of that question had not been made by my superiors in the Department of Justice.

Q. Had there been a tentative determination, if not a definitive one, so far as the idea was conveyed to you by them?

A. All I can state is my own views as to what I felt should be done.

Q. When Mr. Clapp telephoned you on March 12, what did he say to you?

A. He telephoned me twice. The first time he said "Certiorari is denied." He said, in effect, "Don't do anything yet. I want to discuss it here and I will call you back."

Q. Did he say whom he was going to discuss it with?

A. I have no definite recollection that he did.

Q. All right, go ahead.

A. He did call me back within, I should say,

(Deposition of Donald B. MacGuineas)

twenty minutes to half an hour and said, "Go ahead and file." And I did; Mr. Angell and I did.

Q. Now let's get back to the month of November, 1950.

Mr. Lasky: That Solicitor General's release was removed, was it, for photostating?

Mr. Dunne: For photostating at your request, may the record show. I don't know whether that remark is a reprimand to me or offense against an implied charge or what. [23]

Mr. Dunne: That was a pleasantry such as what Mr. Davies referred to.

Mr. Lasky: Well, I will show the witness a copy of the same release. (Handing document to Messrs. Dunne and Angell.)

The Witness: Phil, why don't you sit up here? It would be a little more accessible.

Mr. Dunne: Surely.

Mr. Lasky: May we proceed?

The Witness: Are you ready to proceed, Mr. Dunne?

Mr. Dunne: Yes, sir.

Q. (By Mr. Lasky): Now I am showing you, Mr. MacGuineas, copy of a press release of the Solicitor General of November 28, 1950, a copy of which has already been marked——

Mr. Dunne: 9, isn't it?

Q. (By Mr. Lasky): —No. 9, Petitioners' No. 9, on the deposition of Mr. Killion. Are you acquainted with that release? A. I have seen it.

Q. When did you first see it?

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A. Sometime after it was issued.

Q. Didn't you have a part in its preparation?

A. I had no part in its preparation.

Q. Do you know who did prepare it?

A. I do not.

Q. Was the matter not discussed in the Department to your knowledge?

A. It was not discussed with me; whether it was discussed by others in the Department, I cannot say.

Q. You will note the statement in this press release: "The [24] Government has vigorously resisted the effort of the Dollar interests to regain control of the American President Lines. It will continue to do so in ways the Department of Justice believes open to it, but a petition for re-hearing in the Supreme Court is not an available procedure."

Do you know who it was that decided that the Department of Justice would continue to resist the efforts of the so-called "Dollar interests"?

A. I have no personal knowledge as to who made that definitive decision. I have some—never mind.

Q. Were you told as an attorney in the Department of Justice who had made that decision?

A. My recollection is that I was informed by my immediate superiors that certainly Mr. Peyton Ford, the Deputy Attorney General, and I believe—although I am not positive about this—that the Attorney General himself, had made that decision.

Q. And when was it that you were told that?

A. I can't say except that it must have been

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sometime prior to December 8 when I appeared before Judge McGuire, because I was there appearing under instructions and taking further proceedings in the case.

Q. Now you are familiar with the letter written by the President to Mr. Sawyer, dated November 30th, which you yourself filed in the proceedings before Judge McGuire on or about December 8, 1950?

A. I am.

Q. By the way, was it the original letter you filed in the case [25] there or a photostat?

A. A photostat.

Q. Have you ever seen the original yourself?

A. I am quite sure that I have not.

Q. When did you first hear of that letter?

A. A copy of the letter as signed by the President came to me through the Department of Justice mailing system three or four days after November 30, the date of the letter.

Q. Who in the Department of Justice prepared that letter for the President's signature?

Mr. Dunne: That certainly assumes something that is not in evidence. When you are going to do that, you have got to do it very fast!

Mr. Lasky: It would be wholly impossible to do it too fast for you, Mr. Dunne!

The Witness: May I have that question, please?

(Question read.)

The Witness: I am not sure that I understand

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what you mean by "prepared that letter", Mr. Lasky.

Q. Dictated its contents, drafted its contents.

A. Well, there is a difference, and I want to know exactly what you are asking me.

Q. Is there a difference in the Department of Justice between those two things, drafting contents of a document and dictating them?

A. To my mind, there is.

Q. What is the difference? If you tell me the difference, then I will tell you which one I am asking for.

A. If you are [26] asking me who dictated the letter which was signed by the President, I do not know nor do I know whether that was dictated by anyone in the Department of Justice.

Q. But if I am asking you who drafted the contents, then what? You can answer that?

A. It is my understanding that several people submitted suggested drafts of that letter.

Q. Were you one of them?

A. I was requested to and did prepare a draft of the letter.

Q. Who requested you to do so?

A. I would say now it must have been either Mr. Hickey or Mr. Clapp.

Q. When were you requested to do so?

A. I cannot say except that it was some days prior to November 30.

Q. Just a matter of days, or as much as a week?

A. Something like that.

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Q. After the Supreme Court had denied the writ of certiorari on the 13th of November?

A. Well, I think it would have had to have been, because, as I recall it, the President's letter itself refers to that fact of the Supreme Court's denial of certiorari.

Q. But of course, I don't know whether your draft did refer to that fact. Who else prepared drafts, to your knowledge? A. I do not know.

Q. Did Mr. Hickey?

A. I have no knowledge.

Q. Or Mr. Clapp?

A. I have no knowledge.

Q. You saw no other drafts yourself?

A. I may have [27] seen a draft in the Solicitor General's Office, but my memory on that is not absolute.

Q. Before or after you prepared your own draft? A. I would say after.

Q. And when you prepared your draft, whom did you turn it over to?

A. I sent it along in the—through regular channels, meaning it would go initially to Mr. Hickey.

Q. And then it vanished in the maw of the Department?

A. As far as I ever saw it again, I think it did.

Q. How closely does the final letter written by the—signed by the—President correspond to the draft you prepared?

A. I would say the differences are substantial.

(Deposition of Donald B. MacGuineas.)

Q. Can you point them out, if you looked at the letter of the President?

A. Not with accuracy.

Q. Well, let's take a look at it and point it out as well as you are able to.

Mr. Dunne: With inaccuracy?

Mr. Lasky: We can't expect even an attorney in the Department of Justice to do anything better than he is able to!

Q. (By Mr. Lasky): I show you the copy of that letter. That is the letter, is it not? A photostat of it?

A. Yes, that is the letter. Well, all that I can now recall as having been in my draft, which is in substance stated in the letter as signed by the President, are the statements, one, to the effect that the Attorney General informed the President that the Supreme Court had declined to review the recent decision of the [28] Court of Appeals in the case, and the statement that the United States claims outright ownership of the stock. While I did not use the words as used in the letter signed by the President, it is my impression that I made a statement to the same general effect that the Supreme Court had specifically said in this case that the judgment was not binding on the United States.

Mr. Lasky: I think for the sake of the record we had better have this letter marked as Exhibit 1 on your deposition, Mr. MacGuineas' deposition. Do you think we can get a photostat of that made yet today? I hate to break up this file in which it appears.

(Deposition of Donald B. MacGuineas.)

Mr. Dunne: I don't know whether we can or not. He said 11:00 to 12:00.

Mr. Angell: It is about three or four minutes to 12:00.

Mr. Lasky (addressing Reporter): Will you please mark this. And that will sufficiently identify it for all purposes.

Mr. Dunne: There is not going to be any question about it. I take it, if there is any question about it, this is a copy of the letter that has heretofore been introduced in the hearing in the United States.

Mr. Lasky: Yes, it appears in a certified file, certified copy of the whole file, in those proceedings there, so it is accurate enough.

Q. (By Mr. Lasky): Well, Mr. MacGuineas, were you ever told in the Department who had prepared the draft the President finally signed?

A. No, I was not.

Q. And do you know who it was who requested the President to send out such a letter?

A. No, I do not.

Q. Were you ever told?

A. Not to my recollection.

Q. Now, attached to the complaint that you filed in San Francisco in the United States vs. Dollar, Number——

A. 30407. [30]

Mr. Angell: 30407.

Q. (By Mr. Lasky): ——30407, there are a number of copies of a number of documents purportedly signed by Mr. Clapp and marked Exhibit E, F, G,

(Deposition of Donald B. MacGuineas.)

H, I, J, K, L, M, O, P, Q, and R. You are acquainted with those? A. Yes, indeed.

Q. You prepared them, did you not?

A. (Examining documents): How far did you run?

Q. Clear on up to R, which I think is the last one.

Mr. Dunne: Mr. Lasky, here are your exhibits that were photostated. There is a group from this morning that includes that release.

Mr. Lasky: Thanks.

The Witness: I prepared all of those with the exceptions, of course, of the Marshal's returns of service, which I did not prepare.

Q. (By Mr. Lasky): Yes. And although they went out over the name of Mr. Clapp, you prepared them and sent them out?

A. I dictated them. My secretary wrote them out. I initialed them, sent them to Mr. Hickey; he initialed them, sent them to Mr. Clapp; Mr. Clapp initialed them and signed them, and the telegraph office sent them out.

Q. At whose request did you prepare them, or did you do it on your own responsibility?

A. Well, that—that was the subject of discussions between me and Mr. Clapp and Mr. Hickey. We all agreed that it was the safe and proper thing to [31] do in order to protect the interests of the United States in the subject matter involved.

Q. Who among you was it that made the determination that the notices which appear as Ex-

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hibits "N" and "P" should be put under the caption of the cases in the United States Court of Appeals for the District of Columbia Circuit?

A. I did.

Q. For the purpose of making it appear an official document of the Court?

A. Of course not.

Q. Mr. MacGuineas, I call your attention to Exhibit "E" attached to that complaint, which is a wire purporting to be copy of a wire of December 18, 1950 addressed to Mr. Joseph A. Tognetti in American President Lines, which you have just testified you prepared and caused to go forth.

A. That's right.

Q. You notice it says there: "I understand R. Stanley Dollar and others have made demand upon Mr. Tognetti as transfer agent for Class "A" common stock of American President Lines, Ltd., and upon American President Lines, Ltd., as issuing corporation, that certain stock certificates of that company and so forth "be cancelled" and so on. Now, from whom and how did you understand that Mr. Dollar and others had made such a demand?

A. My present recollection is that I was so informed by my superiors.

Q. Which superiors?

A. Mr. Hickey or Mr. Clapp or perhaps both.

Q. Did he show you any communication by which he had been so informed?

A. I have no recollection of his doing so [32] at that time.

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Q. Or did he tell you that Mr. Killion had communicated with him and told him that such a demand had been made?

A. I have no recollection of having heard any such statement as that.

Q. You have in mind, do you, that the demand made on behalf of Mr. Dollar and associates had been made on December 16, and I call your attention to your Exhibit "C"—

A. Exhibit "C"?

Q. ——"C" attached to the complaint you are looking at, United States vs. Dollar.

A. By the time that I prepared this complaint, I had obviously a copy of Exhibit "C", but whether I had such a copy at the time that I prepared the telegram of December 18—my best recollection is that I did not.

Q. Well, when you prepared the telegram of December 18th, do you say that all you knew about the demand that had been made on behalf of Mr. Dollar and associates was some oral statement that such a demand had been made?

A. That is my best recollection: that such a statement was made to me by my superior in the Department of Justice.

Q. And you never were informed how the information had come to your superiors?

A. I have no recollection that I was.

Q. Have you ever found out how it came there?

A. No.

Q. Now, when you arrived in San Francisco on

(Deposition of Donald B. MacGuineas.)

December 10th, I [33] think you said—I mean, pardon me, March 10th——

A. Saturday night (nodding affirmatively).

Q. ——how soon thereafter did you communicate with Mr. Killion?

A. I don't recall that I did communicate with Mr. Killion.

Q. Ever?

A. To the best of my recollection, the first time—Well, let me put it this way: I know that the first time I saw Mr. Killion after coming here, and to the best of my recollection that is the first time that I had any communication with him, was at a luncheon at the Palace Hotel, I think on Tuesday the 13th.

Q. You had lunch with him at the Palace on Tuesday the 13th. Who else was present?

A. Mr. Phillip Angell was present; Mr. Davies was present; Mr. Raymond Ickes was present; I think those were all.

Q. What conversation occurred concerning the litigation with the Dollars?

A. Nothing very specific. Notice was—I mean, comment was made on the fact that the United States had filed its complaint on the previous day. I would think there was, perhaps, some speculation as to what tactics you were going to pursue. Just general, casual talk about the case.

Q. Was any conversation—was there any conversation—about what would be done in the event

(Deposition of Donald B. MacGuineas.)

we, on behalf of the Dollars, again made demand for the transfer of the stock?

A. Not to my recollection.

Q. When did you next talk to Mr. Killion?

A. I don't believe I talked with Mr. Killion thereafter until the stockholders' [34] meeting on the afternoon of the 19th.

Q. Either in person or by telephone?

A. I am quite—I feel definite that I did not see him in person during that interval, and, as far as I can recall, I didn't talk to him on the telephone.

Q. Did you talk to Mr. Davies in person or by telephone other than at that lunch?

A. I am sure I did not see Mr. Davies after that lunch until the period of the annual meeting, and I feel quite sure that I did not talk with him on the telephone.

Q. Did you talk to Mr. Laughlin?

A. Mr. Laughlin?

Q. Yes.

A. Yes, I talked to Mr. Reginald Laughlin. My impression is he called me in what you might call a "courtesy" call to observe that I was in town and expressed the hope that I would drop over and see him. I said I would be glad to do that when time permitted. I may say that I did not discuss any of the legal problems involved in the case with him.

Q. On your lunch on Tuesday, March 13th, did Mr. Killion express satisfaction that you filed a suit in the name of the United States?

A. I cannot state any particular statement made

(Deposition of Donald B. MacGuineas.)

by Mr. Killion. I have no recollection of any.

Q. You have no recollection of any impression you got about his attitude; is that right?

A. No.

Q. All right. When did you first speak to Mr. Dunne about the case, or any aspect of it?

A. To the best of my recollection I first spoke to Mr. Dunne at the conclusion of the [35] stockholders' meeting here on the 19th when I went up to him and I either introduced myself or someone introduced me. And I expressed my opinion that I thought he had handled the meeting in a very able fashion.

Q. At the lunch on Tuesday, the 13th, did Mr. Killion express chagrin or regret that the Supreme Court had denied certiorari the day before? Whose name did I use there?

A. Killion, you said.

Q. I meant to say that, yes.

A. I do not recall an expression which I would characterize as one of "chagrin" or "regret". I think he may have said, "I wonder why they denied certiorari", or words to that effect.

Q. Now, I show you here a letter that has been marked Petitioners' 14 on Mr. Killion's deposition, which of course is on the letterhead of the Department of Justice, Washington, D. C., addressed to Mr. Joseph A. Tognetti, signed Newell A. Clapp, per D.B.M. You prepared that letter, did you not? A. I did.

Q. Here in San Francisco? A. Correct.

(Deposition of Donald B. MacGuineas.)

Q. Dictated it here? A. Correct.

Q. On stationery you had brought with you?

A. Correct.

Q. Did you talk to Mr. Clapp about what you were putting into that letter, or did you act on your own responsibility?

A. My recollection is that I issued this letter on my own responsibility and pursuant to my general authorization to protect the interests of the United States.

Q. Did you mail it or deliver it in person? [36]

A. That letter was mailed.

Q. The letter starts off: "As you are aware, the United States today instituted suit in the United States District Court at San Francisco * * *" Upon what did you base your statement that Mr. Tognetti was already aware of that suit?

A. Probably on my presumption that by that time—and this letter was written very late in the afternoon of the 12th, as I recall it—my presumption that by that time the Marshal would have served the summons and complaint.

Q. I show you Petitioners' Exhibit 15 on Mr. Killion's deposition, letter dated March 16 on the letterhead of the Department of Justice, addressed to American President Lines, Ltd., attention: Mr. George Killion, President, signed Newell A. Clapp, per D.B.M. You prepared that letter?

A. You said you showed it to me, but you haven't.

Q. I am sorry. I am sorry (handing document to witness).

(Deposition of Donald B. MacGuineas.)

A. Yes, I prepared that letter.

Q. Here in San Francisco? A. Yes.

Q. On your own responsibility?

A. Well, I have been communicating by telephone with Mr. Clapp or Mr. Hickey or, perhaps, both, I would think, every day since I have been here, during which conversation we of course discuss what we are doing and what we propose to do in the suit, and whether I would in the course of one of those conversations have said that I am sending out another notice on behalf of the United States, I have no definite recollection. It is not unlikely that I would have [37] said such in a conversation.

Q. Did you mail this letter, or did you deliver it in person?

A. That letter was delivered by hand, not by me, but by someone from the office of my associate, Mr. Angell, to the best of my knowledge and belief.

Q. Have you any idea to whom it was actually handed here? A. No, I have no idea.

Q. Do you recall Mr. Killion's testimony of yesterday about this letter?

A. I recall generally. I don't know specifically—I don't recall specifically what he may have said about that letter.

Q. Now, this letter is dated March 16, and starts off: "As you have no doubt been informed, the United States District Court for the District of Columbia today entered an order in the case of R. Stanley Dollar, et al., vs. Emory S. Land, et al., Civil Action No. 31468, to the effect that Charles

(Deposition of Donald B. MacGuineas)

Sawyer, Secretary of Commerce, * * * whereupon his failure to do so, the clerk of that court is to instruct your company in the name of the Dollars, the stock certificates in dispute between the government and the Dollars.” Upon what did you base your statement that he had “no doubt been informed”, that, as you say, Mr. Killion had no doubt been so informed?

A. I had no doubt at the time that you or your associate counsel would have informed him of that fact by the time that I wrote the letter.

Q. What time of the day did you write the letter? [38]

A. Approximately noon, as I recall.

Q. San Francisco time? A. Yes.

Q. But you yourself have no knowledge whether Mr. Killion ever saw that letter.

A. Which letter?

Q. The one we are now talking about, Petitioners’ 15 on Mr. Killion’s deposition.

A. No, I don’t know whether he ever saw it or not.

Q. I show you letter, Petitioners’ 16, also dated March 12, 1951—Petitioners’ 16 on Mr. Killion’s deposition—signed Newell A. Clapp, per D.B.M. You wrote that letter too while you were in San Francisco, did you?

A. I thought this was the letter we discussed before. Oh, excuse me. Yes, I wrote that letter.

Q. Mailed it? A. Yes.

Q. Now, Mr. MacGuineas, when did you first

(Deposition of Donald B. MacGuineas)

hear of the entry of the two orders that Judge McGuire made on the 16th of March?

A. Well, as I recall it, I must have been informed of that fact by telephone either from Mr. Hickey or Mr. Clapp in Washington.

Q. What time of day?

A. About—What day of the week was the 16th?

Q. The 16th was a——

Mr. Dunne: Friday.

Q. (By Mr. Lasky): ——Friday.

A. Friday. I can't say. I would feel reasonably certain that I learned of it sometime during the 16th. It is possible that I did not learn of it until the morning of the 17th. [39]

Q. You will notice your letter of the 16th—purportedly of the 16th—to Mr. Killion—purportedly to Mr. Killion—says, refers to one of the orders.

A. That's right. So I must have been informed of it as of about noon the 16th, as I recall the date of writing this Petitioners' 15.

Q. By telephone call from Mr. Hickey or Mr. Clapp? Which did you say?

A. I have more frequently talked with Mr. Clapp, but I could not say specifically on this particular call.

Q. Did he tell you then to send out that letter, No. 15?

A. I cannot state specifically whether in the course of our telephone conversation I indicated to him that I proposed to send such a letter or not.

(Deposition of Donald B. MacGuineas)

Q. Was anything said in that or any other telephone conversation on that day about the Department of Justice taking another appeal from the orders that had been entered?

A. Well, I was informed by telephone conversation with Mr. Clapp that appeals had been taken from the orders of Judge McGuire.

Q. When he informed you that the orders had been entered, did he also inform you that appeals had been taken?

A. I could not say whether it was in the same or another telephone conversation.

Q. You have had more than one conversation per day with Mr. Clapp?

A. In several instances, I have.

Q. Did he tell you the purpose of taking those appeals?

A. To correct the error of the District Court.

Q. A very bland reply! [40]

Mr. Dunne: What else do you take an appeal for?

Mr. Lasky: Gentlemen, you don't take me as being naive, do you? And I certainly don't regard you as naive.

Q. (By Mr. Lasky): Is that all he said on the subject?

A. My recollection is he said "We have taken" or "are taking appeals from Judge McGuire's order."

Q. That's all he said, that you recall?

A. That's all I recall.

Q. Did he tell you to refer to that fact at the

(Deposition of Donald B. MacGuineas)

annual meeting which was coming off on the 19th?

A. I do not recall that he gave me specific instructions as to what to refer to at the annual meeting. He knew that I would attend the meeting as counsel for the United States.

Q. When did you receive copies of the orders, two orders, that had been entered on the 16th of March?

A. I received, as I recall it, a government teletype setting forth those orders, but I know that the receipt of that was considerably delayed because at the time I was quite impatient waiting for it and I didn't get it as early as I thought I should have gotten it.

Q. It came in on the same day, did it? On the 16th?

A. No, it did not. And I was told by Mr. Clapp that a mistake had been made in the telegraph office in Washington and that through error that telegram had been cancelled as of the time that it was sent, and it was not until I telephoned Mr. Clapp and said "Where is that? I haven't received it." He then said, [41] "I will look into it." And he subsequently told me by telephone of this mistake, that the telegraph office had failed to send it promptly and therefore it was not received by me until the following day.

Q. Did he tell you that they had decided to turn over the stock certificates to me, but were not sure whether they were going to do it?

(Deposition of Donald B. MacGuineas)

A. Were not sure whether they were going to turn over the stock certificates to you?

Q. Yes.

A. Mr. Clapp did not tell me anything like that.

Q. Did he refer to the stock certificates?

A. Well, he referred to the stock certificates in a conversation. Whether it was a conversation of the 16th in which he said they were going to turn them over, or whether it was in a conversation of the 17th in which he said they had turned them over, I cannot specifically state.

Q. When did you first learn that the clerk of the Court—I will withdraw that. Did Mr. Clapp tell you that Mr. Sawyer was not going to comply with the provisions of the order requiring him to endorse the certificates?

A. Well, he told me in connection with the notification to me that appeals had been taken, either that the Secretary was not going to or had not, because it was from the direction to the Secretary to do so that the appeal was taken.

Q. And what did he say to you? Anything about the provisions of the order instructing Mr. Sawyer to send a wire to APL's [42] president and directors to make transfer of record?

A. My best recollection is that I did not have any specific word from him as to the terms of the order, that I did not know that until I received this government teletype of which I have spoken.

Q. When did you learn that the clerk of the

(Deposition of Donald B. MacGuineas)

Court had sent out wires pursuant to that order of March 16th?

A. I can't say specifically. I had—When I of course received the government teletype setting forth the order which said that the clerk should do so, I therefore assumed that he would do it. But when I first was informed that he actually had done it, I cannot state.

Q. Did you speak to Mr. Killion and ask him to ignore the wire? A. I did not.

Q. Did you speak to Mr. Davies and ask him to ignore the wire?

A. I did not. I did not know that such a wire had been sent to Mr. Davies until he said so this morning.

Q. Did you speak to Mr. Laughlin and ask him to have the company ignore the wire?

A. I did not.

Q. When did you first learn that proxies were coming out signed by the Secretary of Commerce and by the Assistant Secretary of Commerce?

A. I saw Mr. Paul Page, as I recall it, in Mr. Angell's office sometime during the course of Sunday, the 18th. He then showed me the proxies which he had; he showed me, I believe, only the proxy signed by the Secretary of Commerce. I do not think I saw the other proxy until the stockholders' [43] meeting, and I am not sure that I actually saw it then.

Q. And when Mr. Page showed you that proxy,

(Deposition of Donald B. MacGuineas)

that is the first time you knew anything about proxies coming out from Washington?

A. No, I could not say that definitely. I may have been informed by a telephone call from Mr. Clapp either that the Secretary had executed a proxy or that he was going to.

Q. Did you inquire of Mr. Clapp or of Mr. Page how the Secretary of Commerce could sign a proxy after the stock had been delivered and endorsed by the clerk? A. I did not.

Q. What other conversations did you have with Mr. Page about Dollar vs. Land litigation, and the transfer of the stock, and what was going on here in San Francisco in the way of a new suit?

A. By that time the new suit had been filed.

Q. I know. But did you have a conversation with Mr. Page on the subject?

A. Well, we had a general—a general conversation about, as I recall it, the coming stockholders' meeting on Monday, and I daresay each of us told the other that we would be there. But I didn't tell him anything that I was going to do at the meeting, and I don't recall any specific statements by him.

Q. You also wrote a letter to the Wells Fargo Bank & Union Trust Company, did you not?

A. Under what date?

Q. Well, I don't know. I am asking you on what date. March 16th?

A. I think I have written more than one letter to the Wells Fargo Bank or, at least, prepared one for somebody else's signature. [44]

(Deposition of Donald B. MacGuineas.)

Q. Did you write one on the 16th—Let me withdraw that. Did you write one after you knew of the entry of orders of March 16th in Washington?

A. My recollection is that at about the same time I sent the letter to APL of the 16th, I sent a similar letter to the Wells Fargo Bank which, as I recall, was delivered to the Bank by hand, by Mr. Angell's secretary—so I was informed.

Q. Whom did you have lunch with on Saturday the 17th of March? That is the Saturday before the annual meeting.

A. I can't say definitely. My best recollection is that Mr. Angell and I went out and had lunch with a client of his. I certainly did not have lunch with Mr. Dunne or Mr. Killion or Mr.—

Mr. Angell: If you want the answer to it, I can give it to you.

The Witness: Frankly, I don't recall where we ate that day.

Q. (By Mr. Lasky): With Mr. Gardner and Mr. Davies? A. No, no.

Mr. Angell: It was Mr. James A. Gray at the Ferry Building.

The Witness: That is my recollection.

Mr. Lasky: Well, that's all.

Mr. Dunne: I have no questions.

The Witness: Any questions, Mr. Angell?

(Deposition of Donald B. MacGuineas.)

Mr. Angell: No.

Mr. Dunne: Mr. Fisk? [45]

Mr. Fisk: No questions.

Mr. Dunne: Mr. Tenney?

Mr. Tenney: No.

Mr. Lasky: Are we going to have the same understanding about signing, but waiving the Notary's signature? What do you want to do about it?

Mr. Dunne: I am not representing Mr. MacGuineas, but anything that is agreeable to him is agreeable with me.

Mr. Angell: Let it be stipulated that Mr. MacGuineas may read it and make any corrections that he finds necessary; that it need not be acknowledged before the Notary Public; and that his signature will be sufficient without the acknowledgment.

Mr. Lasky: Yes, that is all right.

Read and corrected in ink.

/s/ DONALD B. MacGUINEAS

[Endorsed]: Filed April 2, 1951.

[Title of District Court and Cause No. 30407.]

PROCEEDINGS ON MOTION FOR SUMMARY
JUDGMENT, MOTION TO DISMISS, MO-
TION FOR JUDGMENT ON THE PLEAD-
INGS

REPORTER'S TRANSCRIPT

Friday, June 1; Monday, June 4, 1951

Before Hon. Edward P. Murphy, Judge.

Appearances: For the Government: Chauncey Tramutolo, Esq., United States Attorney, by Donald P. MacGuineas, Esq., Holmes Baldridge, Esq., Philip H. Angell, Esq., Assistant U. S. Attorneys. For the Defendants: Gregory A. Harrison, Esq., Moses Lasky, Esq., and Alvin J. Rockwell, Esq. For American President Lines, et al.: Arthur B. Dunne, Esq.

* * * * *

Mr. Harrison: This motion is presented to this Court for the purpose of bringing to a summary conclusion by way of dismissal a suit instituted by the United States, which is but an attempt, as we see it, before this Court to relitigate an issue already once decided in another suit, to wit, the suit of Dollar vs. Land, which has been decided by a judgment now become final in the United States Court for the District of Columbia Circuit.

* * * * *

Now at the outset we have the question of what record is here before you. We have presented to this

Court a stipulation, among other things, in writing, entered into in the District of Columbia case, by question propounded and demand for admission propounded to the plaintiff in a timely manner. Counsel for the plaintiff were asked to agree not only that the stipulation in question was one which had been entered into by respective counsel in *Dollar vs. Land*, that it was a true copy thereof and was filed with this court, but also that the facts so stipulated to by the Department of Justice and the Attorney General in *Dollar vs. Land* were true facts. We also asked counsel for the plaintiff in this case by timely request for admission to admit that the joint appendix stipulated to on appeal from the case in the District of Columbia Circuit, and now on file with the Supreme Court, not only was a true copy of the record in those courts, but stated the truth. I would have assumed that the answer would have been readily given, because in the petition for reconsideration this week before the Supreme Court, the record there has been tendered to the Supreme Court of the United States as a fair record upon which that Court is invited to reconsider the merits of the case; and if it is a fair record for the Supreme Court, I assume it is the truth. And if it is a fair record for that Court, I assume it is not only a record presenting the truth to that Court, but would present the truth in this Court. Yet our only answer to a major portion of that request was that the stipulation was quite long, and without asking for any extension of time from this Court or obtaining any order extending the

time, we received an answer that counsel for the plaintiff had not had sufficient time to consider the demands, and if they were forced to answer now, they would deny them because they had not had sufficient time to check them. The same answer in a large measure was given with respect to this record, now tendered by the Attorney General to the Supreme Court as a fair record, presumably, stating the truth.

Now under the cases, of course, it is not only a duty to answer the admissions asked for, affirmative or negative, in a timely manner, but where one does not do so, there is an admission of the truth of the statements asserted in the demand for admissions. The authority supporting that statement I have with me, and I will now deliver a copy to counsel and leave a copy with the Court.

Briefly the rule, as set forth in this memorandum which we now leave with the Court, is that under Rule 36, all matters upon demands for admission with respect to which an admission is requested are deemed admitted unless, within the time prescribed, the matter is denied specifically or facts are set forth which properly show that the party cannot truthfully either admit or deny. Thence it is held that an answer which fails to meet the test of that rule is an admission, and it is also held that these rules apply just as truly to counsel when speaking on behalf of the United States as when speaking on behalf of private citizens. There were two specific denials, neither of which we could understand, because it seemed to us so perfectly clear they were

not facts which were susceptible of denial. There was, for example, a denial that we had truly set forth a copy of an order after judgment entered in the District Court for the District of Columbia. We have a certified copy. We will now file that with the Court to supplement our motion as Exhibit 1 for the moving parties, so that the Court will have the certificate of the Clerk of the Court of the District of Columbia Circuit as to what was the order actually made.

The other was a denial, although it was formally stipulated to—a specific denial or a refusal to admit, at least, that the Robert Dollar Company, one of the defendants in this case and a plaintiff in the case of Dollar vs. Land, had succeeded to certain shares of stock formerly owned by the J. Harold Dollar Estates Company.

I will now offer as Exhibit 2 for the moving party a certified copy of the agreement of merger establishing the succession of parties accordingly.

With that offer completed, we now have before this Court a complete record of admitted facts upon which we ask this Court to apply principles of law and draw the conclusion, the only conclusion which we believe is permissible under the law, to wit, that the motion for summary judgment should be granted and the suit should be dismissed.

* * * * *

Mr. Lasky: Now Mr. Harrison has also referred to the vague or dark insinuations which have been made by counsel for the plaintiff at some time in this case that maybe they might have additional

evidence. The Ninth Circuit has spoken on that matter too. On a motion for summary judgment, where the moving party brings in a record, a genuine undisputed record upon which a judgment positive would follow for the moving party, and other parties contend that there may be other evidence which would change the situation, then that other party must show to the Court just what the other evidence is which it has. *Gifford vs. Travelers Protective Association* in 153 Fed. 2nd was a decision of the Ninth Circuit, and therein it was said: where a party moves for summary judgment and places before the Court, just as we have done here, the material facts which would entitle him to a judgment, "and which the plaintiff does not discredit as dishonest, it rests on plaintiff in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result." We have cited in our brief numerous authorities to that effect; because, as the Court says, it would be trifling with the Court, it would be plain foolishness, as regards the rules of summary judgment, for opposing parties to say, "Oh, we have other evidence, but we won't tell you what it is about; we are going to wait until the trial." They can't do it. So it was their duty if they had any additional evidence to file it by affidavit before today—some indication of what it was, anyway. They haven't done it. And they haven't done it, if Your Honor please, because there is no such additional evidence and there can be none. * * * * *

Mr. Lasky: In the matter just discussed by Mr. Harrison, namely, whether the Maritime Commission ever had any statutory power or authority to acquire this stock as anything but a pledge, as Mr. Harrison has said, that is purely a question of law and arises purely on the face of the pleadings; and is thus presented to the Court not on the motion for summary judgment at all, but on the motion to dismiss or the motion for judgment on the pleadings. That is so because the complaint itself comes in and alleges that in 1938, prior to October, the Dollar defendants or their predecessors were the owners of this stock. It then alleges that the United States acquired title by virtue of an agreement on August 15, 1938, a copy of which is attached to the claim, and then certain transfers were made under that contract in October. That being exactly the contract which is attached to the complaint in *Dollar vs. Land* and which was the subject of that litigation.

Now, if, as a matter of statutory construction of the powers of the Commission—and it is purely a question of statutory construction—the Commission had no power granted to it by Congress to acquire title from the Dollars, then, as the Supreme Court said in this *Dollar vs. Land* in its opinion of 1947, the title never passed. Nothing passed under the contract except a pledge. And consequently, on the face of its own complaint, the United States is out of court. So what is being presented in this third point that has been discussed by Mr. Harrison is

purely a question of statutory construction, appearing upon the face of the complaint, and it doesn't require a consideration of any evidence, any affidavits, any certified copies of anything.

* * * * *

Mr. Harrison: Now it follows from these same statements that Judge Harris himself had none of these matters before him when he acted solely upon the question as to whether he should compel the possession of control of the American President Lines to continue in the hands where it resided when the motion was made. That was the only motion before him, the only motion which he discussed in his opinion on file, and the only matter with respect to which he made any order. As a matter of fact, the record before him shows that repeatedly counsel for the defendants, the Dollars, stated to him that they did not have before him at that time any motion to dismiss or any motion for summary judgment; but that in due course, such motions would be filed and would be argued in this Court, and that it would be argued before this Court that the complaint did not state a cause of action and should be dismissed upon its face, and that for reasons which would be presented to the Court by motion for summary judgment, it should be dismissed by a speaking motion, or upon a speaking motion. That appears from the opinion of the trial judge himself, who issued the temporary order.

* * * * *

Now the record that we present to you here is a record, as we see it, which can permit of no quib-

bling. We present it to the Court here, among other matters, relying upon the very record which is on file in the Supreme Court of the United States, and which, according to the statement of counsel before this Court, has been accepted by the Solicitor General as a record upon which he invites the Supreme Court to decide this case upon the merits and reverse the Court of Appeals of the District of Columbia Circuit. Clearly, the Solicitor General has thereby vouched for the truth and the accuracy, and the completeness of that record. He is speaking for the United States of America and he has said that the plaintiff in this case is prepared to submit this case upon that statement of fact. Counsel cannot come in here now and say, "I, one of the subordinates of the Department of Justice, am too busy today to answer demands for admissions. I am too busy today to even admit that the Solicitor General has stipulated to a true and correct record in the Supreme Court of the United States. I am too busy today to review one hundred and twenty-seven pages that I knew word for word long ago when this case was in a trial court in the District of Columbia. I am too busy today to read over the facts that I so well knew when I argued this case on appeal and on various motions in the District of Columbia, and because I am too busy, this Court is without power to rule upon a motion for summary judgment. Whatever that attitude may have to do as respects the obligation of counsel for the plaintiff in this case, the authorities are perfectly clear that no party can in that manner prevent the prog-

ress of a proceeding on summary judgment before this Court, and that the failure to respond to demands for admissions are themselves admissions.

In the United States District Court for the Northern District of California, Southern Division

No. 30407

[Title of Cause.]

No. 30428

[Title of Cause.]

Appearances:

No. 30407: Philip H. Angell, Spec. Assistant to Attorney General, 200 Bush St., San Francisco, Calif., for Plaintiff.

Dunne, Dunne and Phelps, 333 Montgomery St., San Francisco, Calif., for American President Lines, Ltd., and Joseph A. Tognetti.

Edward G. Chandler, 395 Market St., San Francisco, Calif.; Warner W. Gardner, 734 15th St., N. Y., Washington 5, D. C., for Minority Stockholders.

Brobeck, Phleger and Harrison, 111 Sutter St., San Francisco, Calif., for R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., H. J. Lorber.

Chickering & Gregory, 111 Sutter St., San Francisco, Calif., for Anglo California National Bank of San Francisco, Defendants.

No. 30428: Brobeck, Phleger and Harrison, 111 Sutter St., San Francisco, Calif., for Plaintiff.

Philip H. Angell for Donald B. MacGuineas, Paul D. Page, Jr., A. J. Williams and Lloyd C. Fleming.

Heller, Ehrman, White & McAuliffe, 14 Montgomery St., San Francisco, Calif. for Wells Fargo Bank & Union Trust Co.

Chickering & Gregory, 111 Sutter St., San Francisco, Calif., for Paul E. Hoover.

Arthur B. Dunne for Ralph K. Davies, George L. Killion, M. J. Buckley, Arthur B. Poole, Joseph A. Tognetti, T. L. Eliot, E. E. Mann and American President Lines, Ltd., a corporation; Edward V. Mills, Jr., 333 Montgomery St., San Francisco, Calif., for A. B. Dunne, Respondents.

MEMORANDUM OPINION AND ORDER

The United States of America has filed herein a complaint for possession of personal property and declaratory relief seeking a declaration of rights with respect to the ownership of 100,145 shares of the Class A stock and of 2,100,000 shares of the Class B stock of American President Lines, and of certificates representing said shares, and has applied to this Court for a preliminary injunction. Consolidated with the hearing on this motion is a request made by American President Lines with respect to instructions as to conflicting claims to the ownership of the stock and as to the conduct of the officers and directors with respect to an order on mandate modifying the final judgment made and

entered by Honorable Matthew F. McGuire, District Judge, United States District Court for the District of Columbia, and registered herein under the provisions of Section 1963, Title 28 USCA, under date of March 19, 1951.

Counsel for the Dollars, et al, seek an adjudication against the above named respondents, consisting of executives, directors, attorneys for the American President Line (referred to hereinafter as "APL"), as well as the Wells Fargo Bank & Union Trust Company as transfer agent, for alleged contempt of the aforesaid order.

The matter has come before this Court regularly as a consolidated cause and has been heard on oral testimony and elaborate affidavits, filed herein by respondents, and by the Government.

The Dollars originally brought suit on November 6, 1945, to recover from the then members of the Maritime Commission shares of the common stock of the American President Lines (formerly Dollar of Delaware) which they had transferred to the Commission pursuant to "adjustment agreement of August 15, 1938." Their contention was that the stock had been pledged, that the underlying debt had been paid off and that they were entitled to return of the stock. Defendants' contention was that the suit was an unconsented one against the United States and on the merits, that title to the stock had been transferred outright to the United States acting through the Maritime Commission and the 1938 agreement was not one of pledge. The original suit took many turns, both procedurally and on the

merits, and has been dealt with by both the trial and appellate courts.¹

The case was tried before Honorable Matthew F. McGuire, Judge of the District Court of the District of Columbia, and after a lengthy trial and a voluminous record, he upheld the contention of the defendants that the transaction resulted in the acquisition of the stock and that the Dollars had transferred outright ownership to the Government.

Thereafter, the Court of Appeals reversed the decision and subsequent petition for certiorari was denied. Many motions and procedural steps were thereafter taken by both the individual members of the Maritime Commission and by the Dollars, et al, which finally eventuated in the order more recently made by Judge McGuire.

To fully comprehend the scope of his recent order (and its scope must be fully considered for contempt adjudications are sought thereon), it is necessary to briefly relate the events leading up to its making, as well as the surrounding pronouncements of the Court of Appeals of the District of Columbia Circuit.

Under date of December 11, 1950, counsel for the Dollars, et al, appeared before Judge McGuire seeking a final order after mandate of the Court of Appeals. It was the contention of counsel that an order should be made adding Secretary of Commerce Charles Sawyer as a party defendant. The

¹The citation of, a resume of the decisions herein, as well as all procedural steps taken, may be found as an Appendix hereto.

trial Judge, after seriously questioning jurisdiction, finally made an order which, in substance and effect, assumed to adjudicate title to the stock in question as against all persons.² An appeal was prosecuted to the Court of Appeals and the order of Judge McGuire was modified. The appellate court therein said:

“The result, which is inescapable from the very nature of the controversy, is paradoxical.³ In an action between a private individual and a public official, the court decides that the United States has no interest in the property involved and so the action will lie, but the ensuing judgment is effective only as to the parties before the court and is not *res judicata* against the United States, not a party.”

The reviewing Court then noticed that the District Court, on the return of the mandate entered a judgment assuming to divest the title of any persons under the provisions of Rule 70 FRCP. This paragraph⁴ was modified by the Court of Appeals

² Civil Action No. 31468; Order on Mandate and Final Judgment, Filed December 11, 1950.

³ The paradox has probably been created by over-extension of doctrine of *United States v. Lee*, 106 U. S. 196.

* * * * “If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law * * *”

and expressly limited the same to possession of the shares as against defendants.⁵

Thereafter, the Court of Appeals undertook to bring in Charles Sawyer as Secretary of Commerce under Section 71 FRCP⁶ upon the ground that the litigants had theretofore entered into a stipulation wherein it was agreed that the parties would not sell or otherwise dispose of the shares in question pending final determination. This stipulation was approved by court order.⁷

⁵No. 10875 U.S. Ct. of Appeals, decided Jan. 31, 1951, p. 3: "2. That plaintiffs are entitled to possession of the shares as against defendants, and the defendants are ordered and directed to deliver forthwith to the plaintiffs the said shares. The possession to which plaintiffs are entitled is an effective possession of the shares. In so far as such right requires action on the part of defendants in addition to physical delivery of the certificates, such action is hereby directed to be taken. Plaintiffs are entitled under this judgment to all rights belonging to possessors of the shares. Plaintiffs are further entitled, as provided by Rule 70 of the Federal Rules of Civil Procedure, 'to a writ of execution or assistance upon application to the clerk' of this court, if such writ becomes necessary."

"Rule 71. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."

"It is hereby stipulated and agreed by and between the parties hereto that until the final determination of this case, the defendants will not, nor

It is significant also that the United States Court of Appeals for the District of Columbia, on appeal decided January 31, 1951, in its per curiam opinion deleted the following language in the opinion:

“If the Secretary of Commerce has possession of the shares, and if he were a party to the suit, the order of the court, as herein modified, would be lawfully enforceable against him.”

Thereafter, the opinion was amended in this respect on February 8, 1951, to read:

“If the Secretary of Commerce now has custody or possession of the shares, he obviously acquired such custody or possession since the beginning of this action, indeed since the order of June 11, 1947. Obedience to the order about to be entered pursuant to this opinion is, therefore, enforceable against him, and he is liable under Rule 71, *supra*, to the same process for enforcing obedience to that order as if he were a party, per curiam.”

It is crystal clear that the jurisdiction, if any there is, with respect to Charles Sawyer as Secretary of Commerce is predicated solely upon the stipulation referred to and the order of Court approving the same of June 11, 1947, which stipulation has already been referred to.

The Court of Appeals, as well as the District Court, under said Section 71, now assert jurisdic-

will any of them, either directly or through any agents, assistants, deputies, or employees sell, transfer, or otherwise dispose of the possession or custody of any of the shares of stock which are the subject matter of this suit or of any of the certificates representing said shares of stock * * *”

tion over Sawyer as Secretary and as a public official, in requiring him to endorse the shares in question and to engage in other affirmative acts in order to give to the Dollars "effective possession" of the shares.⁸

In connection with the order of Judge McGuire on mandate modifying the final judgment dated March 16, 1951, it is significant⁹ that the Judge struck from the proposed order submitted to him by counsel for the Dollars the following provisions as proposed:

"Said Charles Sawyer shall forthwith revoke any and all proxies that he may have given to anyone whomsoever to vote any of the B stock referred to above and 100,145 shares of the A stock or any part thereof, at the annual stockholders meeting of American President Lines, Ltd., to be held on Monday, March 19, 1951, or at any adjournment or continuance thereof, and shall forthwith execute and deliver an irrevocable proxy to E. H. Hall, plaintiffs' nominee, authorizing E. H. Hall to vote the said stock at said annual meeting or at any adjournment or continuance thereof, and shall execute no proxies to anyone else. Said proxy to E. H. Hall shall be delivered to him by delivery to said Moses Lasky as plaintiffs' attorney.

* * * * *

⁸No. 10875 U.S. Ct. of Appeals, decided Jan. 31, 1951. * * * "The possession to which plaintiffs are entitled is an effective possession of the shares. * * *'" (See Footnote (5) herein)

⁹See concurring opinion of Mr. Justice Reed, *Land v. Dollar*, 330 U.S. 724 at 741.

“That any and all proxies that said Charles Sawyer may have executed and given to anyone whomsoever to vote any of said B stock or any of the 100,145 shares of the A stock at said annual meeting or at any meeting are revoked;

“(b) That an irrevocable proxy shall be deemed to have been given by Charles Sawyer to E. H. Hall to vote said stock at said annual meeting or any adjournment or continuance thereof;

* * * * *

“That said American President Lines, Ltd., its President, Secretary and Directors are instructed that by virtue of said Order on Mandate plaintiffs are entitled to vote said shares.

* * * * *

“It is further ordered that this Court retains jurisdiction to enter such further orders as may be necessary or appropriate to enforce this Order or to given plaintiffs effective possession of said shares.”^{10 10a}

¹⁰ The right to vote the stock and to be registered as owner on the books of the APL is a prerogative of ownership and not possession of the shares.

^{10a} Although Moses Lasky, Esq., one of the counsel for the Dollars, testified at the time of the hearing before this Court concerning the circumstances surrounding the deletion (Tr. p. 74, et seq.), nevertheless such explanatory note was not known by, or otherwise conveyed to, Arthur Dunne, Esq. when he advised his client concerning the apparent intent of the order and its legal purport. Such circumstance, of course, has a significant bearing upon the contempt proceedings and as to the good faith of the parties.

Charles Sawyer, as an individual, involuntarily delivered to the Clerk of the Court the certificates in question, but refused under the advice of the Attorney General of the United States to endorse the same. The Clerk undertook to endorse the certificates and they were delivered to the Dollars.

On the 19th day of March, 1951, at 2 o'clock p.m., in the City and County of San Francisco, at the office of APL, there was conducted a stockholders' meeting for the purpose of electing a board of directors and a President for the next ensuing term. Conflicting claims of the Dollars, et al, as well as the government of the United States, were made upon the officers and directors of the APL prior to said meeting with respect to ownership of the shares and the certificates representing the same. Charles Sawyer had theretofore executed a proxy for the controlling 92% of said stock and the Dollars undertook, in turn, to vote the stock.¹¹

Written demands had theretofore been made by the Dollars for the transfer of the shares on the books of the corporation. In addition, similar demands were made upon the Wells Fargo Bank and Trust Company as transfer agent. In the presence of conflicting claims to ownership, George Killion, President of APL, employed the services of Arthur B. Dunne, trial lawyer and corporation counsel, to make an independent survey of the records and proceedings and determine what action should be

¹¹ A full report of the proceedings is contained in Defendants' Exhibit "F".

taken. Similarly as to the transfer agent, conflicting claims were made by the Government, as well as by the Dollar interests, as to the ownership of the stock and the right to transfer the same on the books.

Mr. Dunne asserts that he came to an independent judgment, that the issue of ownership had not been finally determined as against the United States of America. In this regard, he concluded:

“It was my opinion and advice and it is still my opinion and conclusion that APL acts at its peril in dealing with the stock in controversy or in dealing with the record thereof on its books and that it should do nothing to change the situation as the same existed on its books on March 15, 1951, without order of court.” (Return to order to show cause, p. 17.)

The proxy of Charles Sawyer was recognized and voted at said meeting and a slate of directors and a President elected.

With that factual background we may now proceed to a determination of the questions presented:

Although counsel for the Dollars denounce the doctrine of sovereign immunity, we must consider at the threshold of any discussion of law the recent case of *Larson vs. Domestic & Foreign Corporation*, 337 U. S. 682, wherein Mr. Chief Justice Vinson said:

(p. 703) “It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may

be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief * * *.'¹²

Mr. Justice Douglas, in extending the doctrine of *United States vs. Lee*, 106 U. S. 196, carved out an asserted remedy for the Dollars. It is perfectly apparent that both the *Lee* case and *Land vs. Dollar* expressly held that title of the United States could not be finally adjudicated without giving the Government its day in court. Therefore, any judgment against the individual members of the Commission

¹²The *Larson* case effectively, if not expressly, overrules *Land v. Dollar*, *supra*.

is not to be regarded as binding upon the Government.

Mr. Justice Douglas said in part, that:

“* * * If it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be *res judicata* as against the United States. (See *United States vs. Lee*, *supra*, p. 222)” (*Land vs. Dollar*, *supra*, p. 739)

In analyzing the decisions of the Court of Appeals of the District of Columbia Circuit as bearing upon this subject, it is fair to observe that the Court has been careful in limiting its decisions and mandate to matters as between the individual parties, members and former members of the Maritime Commission, except in the recent instance wherein jurisdiction is sought against Charles Sawyer in his governmental capacity under the provisions of Section 71 FRCP.

Counsel for the Dollars have very frankly conceded that the United States of America has a perfect right to institute the suit at bar, No. 30407, *United States vs. Dollar*, but they maintain the government cannot prevail. They further admit that the government has the right to quiet title to the stock and that the complaint may not be met with a motion to dismiss. The government claims, with equal propriety, that they have a perfect right to re-litigate the issues involved. In addition, they claim that additional evidence is to be presented.

If the doctrine of *res judicata* is inapplicable, then it appears that the Government has the right, privilege and opportunity, and, indeed, the duty to maintain the instant suit and all incidents thereto, such as applications for injunctive relief. In the light of the clear pronouncements of the appellate courts, it would seem a dereliction of duty if the Attorney General of the United States failed or neglected to carry out the clear import of the decisions.

This Court is confronted with a claim on the part of the Dollars that they have title to and the "effective possession" of the shares of stock and, on the other hand, it is conceded by all parties that the Government has a perfect right to institute the instant suit in declaratory relief and to maintain or invoke such injunctive relief therein as may be necessary and proper.

It is apparent that in the exercise of a sound discretion the status quo should be preserved, pending a final determination, and that a preliminary injunction in order to maintain such status should forthwith issue herein for the following reasons:

(a) Serious doubt has been cast upon the validity of the decision of the Court of Appeals, as well as the order of the District Court of the District of Columbia, wherein Charles Sawyer is sought to be brought in under Section 71 FRCP, not only in aid of execution, but for all practical purposes, as a party defendant in his official capacity.

Assuming, without deciding, that the stipulation already referred to and the order based thereon

might in some manner affect Charles Sawyer personally, then it seems to this Court that the outside limits of such an order, within the clear terms of the stipulation would be to require him to deliver possession into the custody of the Court. That he did. To require him to engage in affirmative acts and conduct under the guise of Section 71 FRCP would be to constitute him a party defendant for all purposes in his official capacity.

Section 71 FRCP cannot afford an indirect method of accomplishing that which could not be done directly. However, as a consequence, Sawyer personally and involuntarily delivered up the certificates.

Charles Sawyer, as Secretary of Commerce, was not a transferee from the original defendants, Emory S. Land, et al, in their individual capacities. He apparently cannot be brought in upon the theory of a "joint tort feisor."

Custody of the certificates on behalf of the United States was vested in him by virtue of the Presidential Reorganization Plan, No. 21, of 1950 (15 F.R. 3178).

Although Charles Sawyer, either in his individual capacity or as Secretary of Commerce, has not directly been brought into the instant contempt proceedings before this Court, nevertheless discussion of this phase of the case is necessary in order to point up, at least in part, the doubt that has been cast upon the final decision of the Court of Appeals, as well as the order of the District Court of the District of Columbia, with respect to the term "effective possession" and as to its legal impact.

It is claimed that this court is bound to give recognition to the order of the District Court of the District of Columbia by reason of the filing herein under 28 USCA 1963. Recognition, of course, should be accorded, but not blind judicial recognition, particularly, when contempt judgments are sought thereon.¹⁴

It is apparent that it was never the intention of either the District Court of the District of Columbia, or the Court of Appeals, to finally pass upon or adjudicate title against the United States. However, although the decrees were limited to "possession" or "effective possession," by imperceptible degrees it is sought to adjudicate final and ultimate title.

Counsel for the Dollar interest, with great ingenuity, learning and industry, decided to maintain the litigation on a purely personal and not governmental level for admitted strategic reasons and in the light of principles of law which they maintained were applicable. In this Court's opinion, they cannot at this juncture be heard to translate the judgment of the courts of the District of Columbia into a final adjudication of title as against the

¹⁴ "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read." *Terminal R.R. Ass'n v. U.S.*, 266 U.S. 17 at 29. *In re Miller & Harbaugh*, 54 F.2d 612; *Berry v. Midtown Service Corp.*, 104 F.2d 107.

United States Government acting through any of its governmental agencies or bodies.¹⁵

(b) Whatever predictions, or dire forebodings, counsel may make with respect to the future of the litigation in *United States vs. Dollar*, No. 30407, it is incumbent to maintain the status quo, and in my opinion grave and irreparable injury would result in the absence of the issuance herein of a preliminary injunction.

There is pressed upon the Court for consideration the alleged mismanagement by the Dollar interests, the Korean war effort, the international crisis, and other matters which, if taken singly, would not be a controlling circumstance. In addition, a minority stockholders group has appeared herein protesting vigorously the alleged incompetent management of the Dollars in the past and claiming that such renewed mismanagement pendente lite would result in the possible loss of their investment.

Counsel for the Government point to the affidavit of Admiral E. L. Cochrane, Chairman of the Federal Maritime Board, and the head of the Maritime Administration, Department of Commerce, setting forth an historical narrative of the operations of the company which, if considered in the light of all of the other surrounding circumstances, impels this Court to exercise its discretion in favor of granting injunctive relief pendente lite. (*United*

¹⁵Larson v. Domestic & Foreign Corporation, *supra*.

North and South Development Co. vs. Raynor, 124 F. 2d 512 (CCA 5); Hoy vs. Altoona Midway Oil Co., 136 F. 283.)

(c) In view of granting the preliminary injunction, the contempt proceedings fall, and accordingly the order to show cause is discharged. It is to be observed that neither American President Lines, nor any of its officers, agents or servants, attorneys or transfer agents were or are parties to the proceedings in the District of Columbia.

However, I do not believe that the drastic remedy of threatened contempt proceedings should be used as a judicial bludgeon to compel or otherwise coerce government officials, business executives and lawyers, into a line of conduct which would require such officials and others to forfeit all claims, benefits and rights reserved and attempted to be conserved for the government of the United States.

There is no evidence of a concerted action between the respondents, that is to say, the executives of the APL, its directors, lawyers and transfer agents,¹⁶ nor is there any evidence with respect to a claimed conspiracy on their part to avoid the consequences of or otherwise thwart or flout the order or decree more recently registered in this court. I believe the respondents acted in good faith and not in contumacy of such order.

¹⁶The Wells Fargo Bank and Union Trust Company as transfer agent acted in compliance with established principles of law in the light of the facts, surrounding circumstances and the conflicting claims made upon them. *Mears v. Crocker First National Bank*, 97 C.A.(2) 482.

(d) The request for instructions on the part of APL and its officers and agents is manifestly answered by the granting of the injunctive relief.

Findings of Fact and Conclusions of Law, under Rule 52 FRCP, in conformity with the foregoing, together with proposed form of injunction, to be prepared and submitted by Government counsel.

Dated: April 6, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Appendix

Aug. 15, 1938: Adjustment agreement executed between Maritime Commission, Dollars, and others providing for transfer of Dollars' stock in operating company to Maritime Commission, release of Dollars from personal liability on debt of operating company to Government, and new loans of four and one half million dollars by Government to operating company.

Oct. 1938: Provisions of adjustment agreement carried out. Stock of operating company endorsed in blank and delivered by Dollars to Maritime Commission, loans advanced to operating company and name of operating company changed from Dollar Steamship Line, Inc., Ltd. to American President Lines, Ltd.

1938-1945: Maritime Commission voted transferred stock at all stockholders' meetings of American President Lines.

July 1945: Maritime Commission invited bids to

purchase stock. Dollars first demanded return of stock on the ground that they had merely pledged it to secure debts of operating company, which had then been paid off. Maritime Commission refused demand and asserted outright ownership of stock in Government.

Nov. 6, 1945: *Dollar, et al. v. Land, et al.* (D.C. D.C.), Civil Action No. 31468. Complaint filed by Dollars against individuals comprising members of Maritime Commission to recover possession of stock.

Dec. 21, 1945: District Court on its own motion dismissed the complaint as an unconsented suit against the United States, not reported.

Mar. 18, 1946: *Dollar v. Land*, 154 F.(2d) 307 (App.D.C.). Court of Appeals, on Dollars' appeal from the judgment of dismissal reversed and held that Congress intended the Maritime Commission to be a sueable entity.

Apr. 7, 1947: *Land v. Dollar*, 330 U.S. 731. Supreme Court on certiorari affirmed the Court of Appeals on the ground that the suit was one to recover possession of specific property allegedly wrongfully withheld, that the District Court had jurisdiction to hear the merits in order to determine the question of jurisdiction, that if the adjustment agreement was illegal or the Dollars were pledgors, under the rule of *United States v. Lee*, 106 U.S. 196, "They are entitled to possession of the shares as against [Land, et al.], though, as we have said, the judgment would not be *res judicata* as against the United States."

Concurrently with filing the petition for certiorari

the Solicitor General filed a motion to substitute new members of the Maritime Commission in place of certain members who had resigned or died. The Supreme Court first added the new members as petitioners-defendants but in its opinion vacated the order of substitution so that the District Court might pass on the motions on remand. 330 U.S. at 739.

May 26, 1947: After remand of the case to the District Court plaintiffs and defendants stipulated to the addition of new members of the Maritime Commission as additional defendants.

Dec. 2, 1948: *Dollar v. Land*, 82 F.Supp. 119 (D.C. D.C.). After trial the District Court held that as a matter of statutory authority the Maritime Commission was authorized to acquire outright title to the stock and that "I am of the opinion therefore that the transfer was outright and one of title and so hold." The District Court dismissed the complaint.

May 24, 1950: After argument of case before Court of Appeals but before decision, Reorganization Plan No. 21 of 1950 (15 F.R. 3178) went into effect, by which the Maritime Commission was abolished and the Secretary of Commerce succeeded to its functions.

July 17, 1950: *Dollar v. Land*, 184 F.(2d) 245 (C.A. D.C.). The Court of Appeals reversed the District Court, reexamined the evidence, and concluded that the Dollars had transferred the stock in pledge and remanded the case for entry of judgment.

Oct. 1950: Petition for certiorari filed by Land, et al. together with motion by the Solicitor General to substitute the Secretary of Commerce as petitioner in place of Land, et al. pursuant to Section 9(b) of the Reorganization Act of 1949 (5 U.S.C. 133z-7(b)). Dollars filed memorandum re motion to substitute suggesting that Supreme Court should not pass on motion to substitute but should transmit it to the District Court, on the ground that Section 9(b) of the Reorganization Act of 1949 had no application and that after remand it would be appropriate, but not necessary, to add Mr. Sawyer's name to the record as a defendant under Rule 25(c) F.R.C.P.

Nov. 1950: The Supreme Court denied certiorari, 340 U.S. 884 and on November 17, 1950 the mandate of the Court of Appeals issued to the District Court (Supp. Tr. p. 1).

Dec. 1, 1950: Dollars filed motion in District Court to enter judgment on mandate of Court of Appeals and to call up for hearing, motion to substitute (Supp. Tr. p. 3).

Dec. 7, 1950: Defendants Land, et al. filed opposition to Dollars' motion for judgment on the ground that they were out of office and no decree should be entered against them, and opposed Dollars' motion to call up for hearing motion to substitute Sawyer on the ground that the District Court had no jurisdiction to pass upon a motion made in the Supreme Court, and that the time to substitute Charles Sawyer as a defendant had expired under Rule 25(d) F.R.C.P. (Supp. Tr. p. 5).

On the same day Charles Sawyer, Secretary of Commerce, filed a special appearance and opposition to plaintiffs' motion, without submitting himself to the jurisdiction of the District Court on the ground that he was not a party to the action and that the time to substitute him as a party under Rule 25(d) F.R.C.P. had expired (Supp. Tr. p. 9).

Dec. 11, 1950: District Court entered order on mandate and final judgment holding that "title to the shares in question is in the plaintiffs [Dollars], since they were never legally divested of the same, and the asserted title of all others arising out of the same transaction to the contrary null and void, and that they are entitled to the delivery and possession of said shares". Not reported, but set out in full in *Land v. Dollar* (C.A. D.C.) opinion of January 31, 1951.

Dec. 12, 1950: Special appearances by the United States and by the Secretary of Commerce without submitting to the jurisdiction of the District Court, to set aside and vacate the final judgment of the District Court (Supp. Tr. pp. 44, 45).

Dec. 15, 1950: District Court denied the motions to vacate judgment made by the United States and the Secretary of Commerce (Supp. Tr. p. 47).

Dec. 15, 1950: Notices of appeal filed by the United States, the Secretary of Commerce, and by the defendants *Land, et al.* (Supp. Tr. pp. 47-49).

Dec. 15, 1950: Application by the United States to the District Court to stay the judgment pending appeal, with affidavit of E. L. Cochrane filed in support thereof (Supp. Tr. pp. 49-55). Opposition to

application for stay filed by Dollars December 18, 1950.

Dec. 18, 1950: Stay pending appeal granted by the District Court.

Dec. 29, 1950: Motion filed by Dollars in Court of Appeals to dismiss appeals.

Opposition to Dollars' motion to dismiss appeals filed by the United States, Secretary of Commerce, and Land, et al., with supporting memorandum of points and authorities.

Jan. 31, 1951: *Land v. Dollar, United States v. Dollar, Secretary of Commerce v. Dollar* (C.A. D.C.), not reported. The Court of Appeals dismissed the appeal of the United States (No. 10875) and dismissed the appeal of the Secretary of Commerce (No. 10876). On the appeal of Land et al. (No. 10868) the Court of Appeals remanded the complaint with direction for entry of a modified judgment which eliminated all reference to the adjudication of title to the stock. The Court of Appeals held that the Dollars were entitled to effective possession of the shares as against the defendants (Land, et al.), that the judgment prescribed to be entered by the District Court would be enforceable against the Secretary of Commerce if he then had custody or possession of the shares, or "against another official, or other officials, against whom the order might be lawfully enforced if he or they were a party or parties to the suit". The Court of Appeals held that "the ensuing judgment is effective only as to the parties before the Court and is not *res judicata* against the United States, not a party".

Feb. 1951: Application of stay of mandate of Court of Appeals pending certiorari submitted to Chief Justice Vinson by Land, et al. and the Secretary of Commerce, supported by affidavit of E. L. Cochrane. Stay pending certiorari granted by the Chief Justice.

Feb. 1951: Petition for certiorari filed by Land, et al. and the Secretary of Commerce (No. 552 Oct. Term 1950) and petition for rehearing of previous denial of certiorari also filed by Land, et al.

Motion for leave to file brief amici curiae, with proposed brief, in support of petitions for writs of certiorari and for rehearing filed in Supreme Court by minority stockholders of American President Lines, Ralph K. Davies, et al.

Mar. 12, 1951: Petition for writ of certiorari and petition for rehearing of denial of previous writ of certiorari denied by the Supreme Court.

Mar. 12, 1951: *United States v. Dollar, et al.* (D.C.N.D.Cal.) Civil Action No. 30407. Complaint filed in this Court to quiet title of United States to stock.

Mar. 16, 1951: *Dollar v. Land* (D.C. D.C.). District Court entered order on mandate modifying final judgment. District Court also entered enforcement order directing Secretary of Commerce to turn over stock certificates to Dollars, to endorse them in the name of the Maritime Commission and to instruct American President Lines to register the Dollars as owners of the stock, with the provision that in the event the Secretary of Commerce refused

to do so such action should be taken by the clerk
of that district court.

Mar. 16, 1951: The Secretary of Commerce delivered the stock certificates to counsel for the Dollars but declined to endorse them or to instruct American President Lines to register Dollars as owners.

Notices of appeal from orders of District Court of District of Columbia filed by defendants Land, et al. and by Secretary of Commerce.

Mar. 19, 1951: United States v. Dollar (D.C. N.D. Cal.) Civil Action No. 30407. Motion for preliminary injunction filed by the United States.

[Endorsed]: Filed April 6, 1951.

In the United States District Court for the North-
ern District of California, Southern Division

No. 30407

United States of America,

Plaintiff,

VS.

R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., H. M. Lorber, American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco, Defendants.

No. 30428

R. Stanley Dollar, et al., Plaintiffs,
vs.

Emory S. Land, et al., Defendants.

In the Matter of the Application of R. Stanley Dollar, Dollar Steamship Line, a corporation, The Robert Dollar Co., a corporation, and H. M. Lorber, Petitioners,

in proceedings supplementary to final judgment for orders enforcing final judgment; and for the issuance of an order to show cause in civil contempt against Donald B. MacGuineas, Ralph K. Davies, George L. Killion, M. J. Buckley, Paul E. Hoover, Arthur B. Poole, Paul D. Page, Jr., A. J. Williams, Wells Fargo Bank & Union Trust Co., a corporation, Joseph A. Tognetti, A. B. Dunne, Lloyd C. Fleming, T. L. Eliot, E. E. Mann, and American President Lines, Ltd., a corporation,

Respondents.

ORDER

On the Court's own motion,

It Is Ordered that the opinion and decision and memorandum thereof regularly made and entered on the 6th day of April, 1951, may constitute and serve as the Court's findings of fact and conclusions of law under Rule 52(a) FRCP; the instructions and directions given to counsel to prepare findings, and the form of preliminary injunction, are vacated and set aside.

In conformity with the Court's decision and order heretofore regularly made and entered,

It Is Ordered, Adjudged and Decreed that a preliminary injunction shall issue forthwith in form and content as annexed hereto; the United States Marshal is hereby instructed and directed to forthwith serve copies of said preliminary injunction upon the above named defendants and each of them.

Dated: April 11, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause No. 30407.]

PRELIMINARY INJUNCTION

This action came on to be heard on the verified complaint of the United States of America, the affidavit of E. L. Cochrane, Chairman of the Federal Maritime Board and the head of the Maritime Administration, Department of Commerce, and the affidavit of Donald B. MacGuineas, counsel for plaintiff the United States, filed herein, and upon plaintiff's motion for a preliminary injunction against the defendants;

And it appearing that plaintiff the United States on the one hand, and defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber on the other hand, assert conflicting claims to the ownership of 100,145 shares of Class A

stock and of 2,100,000 shares of the Class B stock of defendant American President Lines, Ltd. and of stock certificates representing said shares numbered BX-26, BX-27, BX-28, AX-10, A-150 issued in the name of United States Maritime Commission, and that said shares and certificates constitute approximately 92 per cent of the voting stock of defendant American President Lines, Ltd.; that the validity of the title of the United States to said certificates and shares of stock represented thereby has not been adjudicated; that plaintiff the United States is not a party to the action in the United States District Court for the District of Columbia entitled *R. Stanley Dollar et al. v. Emory S. Land et al.*, Civil Action No. 31468, upon the proceedings and judgments in which case defendants *R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber* base their claim to be the lawful owners of said stock and said certificates; and plaintiff the United States is not bound or concluded by the proceedings taken or judgments entered in said action;

And it further appearing that on March 16, 1951, the United States District Court for the District of Columbia entered in said action No. 31468, an order on mandate modifying final judgment providing:

“Now, therefore, it is hereby ordered, adjudged and decreed as follows:

“1. That in conformance with and obedience to the said mandate of the Court of Appeals, the judgment of this Court of the 2nd day of December, 1948, is hereby vacated.

“2. That plaintiffs are entitled to possession of the shares as against defendants (asterisk), and the defendants are ordered and directed to deliver forthwith to the plaintiffs the said shares. The possession to which plaintiffs are entitled is an effective possession of the shares. In so far as such right requires action on the part of defendants in addition to physical delivery of the certificates, such action is hereby directed to be taken. Plaintiffs are entitled under this judgment to all rights belonging to possessors of the shares. Plaintiffs are further entitled, as provided by Rule 70 of the Federal Rules of Civil Procedure, ‘to a writ of execution or assistance upon application to the clerk of this Court, if such writ become necessary’.

“(Asterisk) Plaintiff Dollar Steamship Line 2,100,000 shares of the B stock and 2,075 shares of the A stock: Plaintiff R. Stanley Dollar 51,174 shares of the A stock: Plaintiff The Robert Dollar Company 37,722 shares of the A stock: Plaintiff H. M. Lorber 9,174 shares of the A stock.”

And it further appearing that on March 16, 1951, the United States District Court for the District of Columbia entered in said action No. 31468 a further order providing:

“Now, therefore, it is hereby ordered as follows:

“1. Said Charles Sawyer shall endorse each of said stock certificates in blank by signing thereon in the place provided for endorsement ‘United States Maritime Commission, by Charles Sawyer, Secretary of Commerce.’ And shall forthwith deliver them to the plaintiffs. Such delivery may be

made to Moses Lasky, one of the plaintiffs attorneys.

“2. If said Charles Sawyer delivers said certificates to plaintiffs or to said Moses Lasky, without having endorsed them, the clerk of this Court shall, at the request of any of the attorneys of the plaintiffs, endorse each of said certificates in blank, signing them ‘United States Maritime Commission, by Harry M. Hull, Clerk of the United States District Court for the District of Columbia,’ and shall attach to each of said certificates a certified copy of this order and a certified copy of the above order on mandate modifying final judgment and shall forthwith return said certificates to the plaintiffs through their attorneys.

“3. Said Charles Sawyer shall also forthwith by telegram instruct American President Lines, Ltd., its president, secretary and directors to transfer all the B stock, and 100,145 shares of the A stock of American President Lines, Ltd., to the plaintiffs in the amounts specified in the above mentioned order on mandate, and to make such transfers of record prior to said annual meeting.

“4. In the event the said Charles Sawyer failed by 9:00 a.m., on March 17, 1951 to give to the clerk and to plaintiffs’ attorneys at Room 432 Shoreham Building, Washington, D. C. proof satisfactory to said attorneys that he has complied with the provisions of paragraph 3 above, the clerk of this Court shall forthwith give American President Lines, Ltd., its president, secretary and directors at 311 California Street, San Francisco 4, California the following instructions and advice:

“That said American President Lines, Ltd., its president, secretary and directors are instructed to transfer all said shares of stock of record to the plaintiffs in the amounts specified in the said order on mandate, and to do so prior to the annual meeting of American President Lines, Ltd., on Monday, March 19, 1951; and

“The clerk shall give said advices and instructions by telegram or teletype so that they may reach their destinations prior to the said annual meeting on March 19, 1951. The clerk may give said instructions and advices by sending to American President Lines, Ltd., its president, secretary and directors by telegram or teletype a copy of said order on mandate and a copy of this order together with a statement that the instructions commanded to be given by this paragraph 4 of this order shall be deemed thereby to have been given.”

And it further appearing that said district court, although requested so to do by counsel for plaintiffs in that action, refused to order the revocation of any proxy to vote said stock at the Annual Meeting of stockholders of American President Lines, Ltd., called for March 19, 1951, given by Charles Sawyer, Secretary of Commerce and refused to order said Charles Sawyer to execute such a proxy in favor of a nominee of plaintiffs in that action; and that said district court, although requested so to do by counsel for plaintiffs in that action refused to instruct defendant American President Lines, Ltd., that the plaintiffs in that action are entitled to vote said stock;

And it further appearing that Charles Sawyer, Secretary of Commerce, delivered said stock certificates to counsel for plaintiffs in that action, but refused to endorse said certificates and refused to instruct defendant American President Lines, Ltd., to register the plaintiffs in that action as the owners of said stock, and executed a proxy to a representative of the United States to vote said stock at the Annual Meeting of stockholders of defendant American President Lines, Ltd. called for March 19, 1951; that the clerk of the United States District Court for the District of Columbia endorsed said certificates "United States Maritime Commission, by Harry M. Hull, Clerk of the United States District Court for the District of Columbia," and telegraphed defendant American President Lines, Ltd., "advices and instructions" to register the plaintiffs in that action as the owners of said stock;

And it further appearing that said order of the United States District Court for the District of Columbia does not adjudicate whether plaintiff the United States, or defendants R. Stanley Dollar, et al., are the lawful owners of said stock; that said order could not adjudicate the rights of plaintiff the United States with respect to said stock, since it is not and cannot be concluded by any proceeding in said action No. 31468;

And it further appearing that said shares of stock are registered on the stock transfer books of defendant American President Lines, Ltd., in the name of "The United States Maritime Commission," and that by virtue of Presidential Reorgani-

zation Plan No. 21 of 1950 (15 Fed. Reg. 3178), effective May 24, 1950, the Maritime Commission was abolished and the Secretary of Commerce succeeded to its functions with respect to said stock;

And it further appearing that defendant American President Lines, Ltd., is an important and integral unit in the American Merchant Marine transporting military personnel and supplies and strategic materials to and from the United States and Asia, and in the light of the present international crisis, it is of vital importance to the public welfare of the United States that there be not even a temporary interference with, or diminution in, the efficiency of the trans-pacific and around-the-world service operated by defendant American President Lines, Ltd.;

And it further appearing that defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber have made demands upon defendant American President Lines, Ltd., and its directors and officers to be recognized as the owners of said shares and certificates, to have issued to them new certificates evidencing the asserted ownership of said shares by said defendants, and their asserted right to the control of defendant American President Lines, Ltd., its management, property, and affairs, and to be registered on the stock transfer books of defendant American President Lines, Ltd., as the owners of said shares;

And it further appearing that defendant Wells Fargo Bank and Union Trust Company is the transfer agent of the issued Class A stock of defendant

American President Lines, Ltd.; defendant Joseph A. Tognetti is the transfer agent of the Class B stock of defendant American President Lines, Ltd.; defendant The Anglo California National Bank of San Francisco is the registrar of the Class A stock of defendant American President Lines, Ltd.; and that defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber have made similar demands upon said defendants Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti and The Anglo California National Bank of San Francisco;

And it further appearing that said defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, will, unless restrained and enjoined by order of this Court, persist in such demands upon defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti and The Anglo California National Bank of San Francisco, to be recognized as the owners of said shares and certificates; and that defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber will, unless restrained and enjoined by order of this Court, immediately take all possible steps to take over the control, management, and operation of defendant American President Lines, Ltd.;

And It further appearing that defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and The Anglo California National Bank of San Francisco will, unless enjoined by order of this Court, yield to

said demands made upon them by defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, will recognize said defendants as the true and lawful owners of said shares and certificates, will cause said defendants to be registered on the stock transfer books of defendants American President Lines, Ltd. as the owners of said shares, and will cause new certificates to be issued to said defendants as the owners of said shares, all to the immediate and irreparable injury of plaintiff the United States;

And it further appearing that said shares of stock have a special, unique and peculiar value, particularly in that they embody control of the affairs of defendant American President Lines, Ltd., and the control of defendant American President Lines, Ltd., by defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber would, even if only temporary, have a seriously detrimental effect upon the efficient operation of defendant American President Lines, Ltd., with consequent immediate and irreparable injury to plaintiff the United States and to the public welfare;

Now, Therefore, It Is Hereby Ordered by this Court that, in order to preserve the status quo pending the determination by this Court as to whether plaintiff on the one hand, or the defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber on the other hand, are the lawful owners of said stock, the defendants R. Stanley Dollar, Dollar Steamship Line, The Robert

Dollar Co., and H. M. Lorber and their respective officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be, and they hereby are, enjoined pending the entry of final judgment in this action, from exercising or attempting to exercise any rights or privileges as owners of stock certificates BX-26, BX-27, BX-28, AX-10, A-150 and the shares of stock represented thereby consisting of 100,145 shares of Class A stock and 2,100,000 shares of Class B stock of defendant American President Lines, Ltd.; and from making any demands upon defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti and The Anglo California National Bank of San Francisco that new certificates representing said shares of stock of defendant American President Lines, Ltd., be issued to defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, or that said defendants be registered as the owners of the shares of stock represented by said certificates No. BX-26, BX-27, BX-28, AX-10, A-150; and from pledging, selling, transferring, or otherwise disposing of said stock certificates and the shares of stock represented thereby; and

It Is Further Ordered by this Court that defendants American President Lines, Ltd., Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti and The Anglo California National Bank of San Francisco, their respective officers, agents, servants, employees, and attorneys, and all persons

in active concert or participation with them, be, and they hereby are, restrained, pending the entry of final judgment in this action, from issuing any new certificates of stock of defendant American President Lines, Ltd., representing said shares to defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber; from registering or recording defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, or any of them, as owners of any of the shares of stock of defendant American President Lines, Ltd., now represented by certificates numbered BX-26, BX-27, BX-28, AX-10, and A-150; and from in any way recognizing said defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber, or any of them, as the lawful owners of said shares of stock or said certificates.

Dated: April 11, 1951.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause No. 30407.]

NOTICE OF APPEAL

Notice Is Hereby Given, this 20th day of April, 1951, that R. Stanley Dollar, Dollar Steamship Line, a corporation, The Robert Dollar Co., a corporation, and H. M. Lorber, some of the defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of this Court entered herein on or about April 11, 1951, granting a preliminary injunction and directing that such an injunction should issue, and from the preliminary injunction issued on or about April 11, 1951, and from the order made and entered on or about April 6, 1951, with respect to the issuance of a preliminary injunction.

/s/ HERMAN PHLEGER,
/s/ GREGORY A. HARRISON,
/s/ MOSES LASKY,
/s/ ALVIN J. ROCKWELL,
/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendants and Appellants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause No. 30428.]

NOTICE OF APPEAL

Notice Is Hereby Given, this 20th day of April, 1951, that petitioners R. Stanley Dollar, Dollar Steamship Line, a corporation, The Robert Dollar Co., a corporation, and H. M. Lorber hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order or judgment of this Court entered herein on or about April 6, 1951 discharging the order to show cause issued on March 21, 1951 which directed respondents to show cause why they should not be adjudged in contempt of court and why the court should not make the orders supplementary to final judgment prayed for in the petition herein, and said petitioners also appeal from the order entered herein on or about April 11, 1951.

/s/ HERMAN PHLEGER,
/s/ GREGORY A. HARRISON,
/s/ MOSES LASKY,
/s/ ALVIN J. ROCKWELL,
/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for Petitioners and Appellants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause No. 30407.]

ANSWER OF DEFENDANTS R. STANLEY
DOLLAR, DOLLAR STEAMSHIP LINE,
THE ROBERT DOLLAR CO. AND H. M.
LORBER

Defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber, hereinafter called "these defendants", answer the complaint as follows:

1. Answering the allegations of paragraph 2 of the complaint, these defendants deny that the United States of America is the plaintiff herein and allege that the attorneys who have purported to file the complaint herein in the name of and on behalf of the United States of America do not now and never had any authority in law to do so. For convenience, however, the term "plaintiff" will hereafter be used to denote the "United States of America".

2. These defendants admit the allegations of paragraphs 3, 4, 5, 6, 7, 8, 13 and 14 of the complaint.

3. Answering the allegations of paragraph 9 of the complaint, these defendants

Admit that in the year 1938 the name of defendant American President Lines, Ltd., hereinafter referred to as "APL", was Dollar Steamship Lines, Inc., Ltd.;

Admit and allege that 2,100,000 shares of the B stock of APL are represented by Certificates BX-26,

BX-27, BX-28, that 113,206 shares of the A stock of APL are represented by Certificates AX-10 and A-150, that Certificate A-150 was issued by APL under its present corporate name and the other certificates just mentioned under its former corporate name, that the said 2,100,000 shares of the B stock and 113,206 shares of the A stock constitute approximately 92% of the voting stock of APL, and that 13,061 shares of the total number of shares of A stock represented by Certificate AX-10 are not involved in this action;

Admit that a written agreement dated August 15, 1938 was entered into among APL (in its then corporate name, Dollar Steamship Lines, Inc., Ltd.), these defendants, defendant Anglo California National Bank of San Francisco, the United States Maritime Commission, and certain other parties, and that Exhibit A attached to the complaint is a true copy of said agreement;

Admit that pursuant to the terms of said agreement defendants Dollar Steamship Line, R. Stanley Dollar and H. M. Lorber, and J. Harold Dollar Estate (a predecessor in interest of defendant The Robert Dollar Co. with respect to certain of said shares) and other predecessors in interest of defendants R. Stanley Dollar and The Robert Dollar Co. endorsed, in blank, certificates representing said shares and delivered them to a representative of the United States Maritime Commission;

Allege that thereafter the United States Maritime Commission caused the defendant APL to issue to said Commission, in the name "United States

Maritime Commission'', new certificates representing said shares, namely, said Certificates BX-26, BX-27, BX-28, AX-10 and A-150;

Allege that said transfers were by way of pledge only, to secure a certain indebtedness from APL to the plaintiff, and that said indebtedness was fully paid and discharged by the end of 1943;

Deny each and every allegation of paragraph 9 of the complaint not expressly admitted above, deny that the plaintiff is the owner of or has any interest whatever in any of the said shares or certificates referred to in said paragraph 9, and allege that these defendants are the owners thereof, as follows:

Defendant Dollar Steamship Line — 2,100,000 shares of the Class B stock and 2,075 shares of the Class A stock;

Defendant R. Stanley Dollar—51,174 shares of the Class A stock;

Defendant H. M. Lorber—9,174 shares of the Class A stock; and

Defendant The Robert Dollar Co.—37,722 shares of the Class A stock.

4. Answering paragraph 10 of the complaint, these defendants

Admit that the judgment entered January 31, 1951, by the United States Court of Appeals for the District of Columbia Circuit directed the United States District Court for the District of Columbia to enter a judgment in the case of R. Stanley Dollar, et al. vs. Emory S. Land, et al., Civil Action No. 31468, granting these defendants possession of said certificates, and allege that said judgment of said

Court of Appeals also directed said District Court to enter judgment granting these defendants, who were plaintiffs in said action, effective possession of the shares to which said certificates pertain, as well as of the certificates, and all the rights of possessors of the shares;

Admit that Exhibit B attached to the complaint is a true copy of the judgment and opinion of said United States Court of Appeals entered January 31, 1951, as amended on February 8, 1951, the handwritten addition appearing at the end of said exhibit being added on February 8, 1951 in lieu of the part shown as stricken;

Admit that on March 12, 1951, the United States Supreme Court denied petitions for writs of certiorari filed by Charles Sawyer, Secretary of Commerce, and by the defendants in said action (No. 552, October Term, 1950) to review said judgment of January 31, 1951;

Admit and allege that on March 16, 1951, pursuant to said judgment, the United States District Court for the District of Columbia made and entered its order on mandate and a further order, and that Exhibits 1 and 2 attached to this answer are true copies, respectively, of said order on mandate and order;

Allege that on March 16, 1951, the defendants in said action and Charles Sawyer appealed to the United States Court of Appeals for the District of Columbia Circuit from said order on mandate and said order, that on April 4, 1951 said Court of Appeals dismissed said appeals as frivolous and re-

served jurisdiction to impose sanctions for violation of its orders, decisions, and judgments, and that on April 11, 1951, said Court of Appeals made clear beyond peradventure of doubt the meaning of its judgment of January 31, 1951 by an opinion, a true copy of which is attached hereto as Exhibit 3;

Allege that on March 16, 1951, Charles Sawyer, Secretary of Commerce, delivered to plaintiffs in said action, these defendants here, said certificates without prior issuance of any writ of assistance but delivered said certificates unendorsed, and that on March 17, 1951, the Clerk of said District Court endorsed each of said certificates in the manner prescribed in the order of March 16, 1951, and that he sent out the instructions required by said order;

Allege that the allegations of paragraph 10 of the complaint that "If said certificates thereby come into possession of the Dollar defendants, the delivery of said certificates to them by said Charles Sawyer will not be a voluntary act on his part, nor an act by him in his official capacity representing plaintiff", and the further allegation that such delivery will be by Charles Sawyer only in his individual capacity, without authority from plaintiff, and only under the compulsion of said judgment of the United States District Court for the District of Columbia, are conclusions of law and not fact, and that they are incorrect conclusions of law.

Deny each and every allegation of paragraph 10 of the complaint not expressly admitted above.

5. Answering the allegations of paragraph 11 of the complaint, these defendants

Admit that the plaintiff was not originally a party of record to said action in the United States District Court for the District of Columbia but allege that upon and with the filing in said case of defendants' Answer to the Amended Complaint, on or about July 29, 1947, plaintiff became and at all times thereafter has been and is a party thereto with the same force and effect as if a party of record, and that the plaintiff became a party of record to said cause on or about December 7, 1950;

Allege that plaintiff has never had any title to said shares or certificates, has never been the owner of any of them, and has never had any right to the possession of any of them after the payment of said debt in 1943;

Deny that the plaintiff is not bound or concluded by the said judgment, allege that it is bound and concluded by said judgment and by all proceedings taken for the enforcement thereof, and deny each and every allegation of paragraph 11 of the complaint not expressly admitted above.

6. Answering the allegations of paragraph 12 of the complaint, these defendants admit that they claim to be, and allege that in fact they are, the owners of said shares and certificates in the amounts set forth in paragraph 3 above, and deny each and every allegation of paragraph 12 of the complaint not expressly admitted or alleged above.

7. Answering the allegations of paragraph 15 of the complaint,

These defendants admit that Exhibits E to R, inclusive, are true copies of written notices served

at the times and on the persons and corporations alleged; deny that said or any of said notices were served by plaintiff and allege that they were served by the attorneys who have filed the complaint herein;

Deny that the plaintiff is or ever has been the owner, either true and lawful or otherwise, of any of said shares, and deny each and every allegation of paragraph 15 not expressly admitted.

8. Answering paragraph 16 of the complaint, these defendants admit that said shares of stock have a special, unique and peculiar value so that a suit at law for damages for their unlawful withholding would be inadequate, and deny each and every other allegation of said paragraph 16.

9. Answering the allegations of paragraph 17 of the complaint, admit that the attorneys who have filed the complaint herein have made the demands referred to in the said paragraph and that these defendants refused to comply with the demands, but deny that plaintiff made said or any of said demands.

10. These defendants deny each and every allegation of paragraph 18 of the complaint and allege that the plaintiff has no title or property rights in or to said shares or certificates or any of them.

11. These defendants deny each and every allegation of paragraph 19 of the complaint; allege that APL is presently in the hands of and under the control of de facto officers and directors who are the tools, agents, appointees and co-conspirators of Charles Sawyer, Secretary of Commerce; that the

defendant Joseph A. Tognetti is a mere employee and agent of said defacto officers and directors and subject to their domination and control, and that he and defendants Wells Fargo Bank & Union Trust Co. and Anglo California National Bank of San Francisco are refusing and, unless compelled by appropriate legal process, will continue to refuse, to recognize these defendants as the true and lawful owners of said shares and certificates, and are refusing and will continue to refuse to cause new certificates to be issued to these defendants as owners of said shares and certificates, to the irreparable injury of these defendants.

12. These defendants deny the allegations of paragraph 1 and paragraph 20 of the complaint.

13. Answering the allegations of paragraph 21 of the complaint, these defendants admit that the defendant APL is an important and integral unit of the American Merchant Marine, that these defendants will, unless restrained by this Court, take all steps permitted by law to obtain the effective possession of the aforesaid shares of stock of APL and to have and to exercise all the rights of possessors and owners thereof, and that by August, 1938, defendant APL was in a precarious financial condition; deny each and every allegation of said paragraph 21 not expressly admitted above.

Second Defense

The defendant Dollar Steamship Line is the owner of all the shares of B stock of defendant APL, to wit, 2,100,000 shares, being the shares rep-

resented by Certificates BX-26, BX-27 and BX-28. Said defendant is the owner of 2,075 shares, defendant R. Stanley Dollar is the owner of 51,174 shares, defendant The Robert Dollar Co. is the owner of 37,722 shares, and defendant H. M. Lorber is the owner of 9,174 shares of the A stock of APL, all of said A shares being represented by Certificates AX-10 and A-150.

Third Defense

1. On and prior to October 26, 1938, Dollar Steamship Line was, and at all times thereafter it has been and is, the owner of 2,100,000 shares of Class B stock of defendant APL and of 2,075 shares of the Class A stock. At all said times defendant H. M. Lorber was and is the owner of 9,174 shares of said Class A stock. Defendant The Robert Dollar Co. is, and at all times from and including October 26, 1938, it, or it and its predecessors in interest were, the owner of 37,722 shares of said Class A stock. Defendant R. Stanley Dollar is, and at all times from and including October 26, 1938, he, or he and his predecessors in interest were, the owner of 51,174 shares of the A stock.

2. Pursuant to a certain agreement entered into under date of August 15, 1938, a copy of which is attached to the complaint herein as Exhibit A, as amended on August 19, 1938, these defendants and their predecessors in interest on October 26, 1938 transferred to the United States Maritime Commission said shares and the certificates representing them, and the United States Maritime Commission

on that day and thereafter caused new certificates to be issued in the name of United States Maritime Commission representing said shares, to wit, said Certificates BX-26, BX-27, BX-28, AX-10 and A-150.

3. Said agreement was an agreement of pledge of said shares, and the transfers made pursuant thereto were by way of pledge only, to secure a certain indebtedness of defendant APL to the United States. Said indebtedness was subsequently paid in full by the end of the year 1943.

Fourth Defense

1. These defendants incorporate herein with the same force and effect as if here set forth in full all the allegations of paragraphs 1 and 2 of the Third Defense above.

2. At all times herein mentioned the United States Maritime Commission was without any statutory or legal authority or power whatsoever to purchase or acquire outright ownership of shares of stock in a private corporation, and particularly to acquire or purchase outright ownership for itself or on behalf of the United States of said shares of stock referred to above, or to do so under or pursuant to said agreement. Consequently, the plaintiff herein acquired no more than a security interest in said shares of stock to secure the payment of the said debt.

Fifth Defense

1. These defendants incorporate herein with the same force and effect as if here set forth in full all

the allegations of paragraphs 1 and 2 of the Third Defense above.

2. On November 6, 1945, members of the United States Maritime Commission, having come into possession of said certificates and the shares of stock represented thereby in the circumstances alleged above, were still in possession of them.

3. On that day an action for the recovery of said shares was commenced by R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company and H. M. Lorber in the United States District Court for the District of Columbia against Emory S. Land, Howard L. Vickery, Edward Macauley, John M. Carmody and Raymond S. McKeough, the members of the United States Maritime Commission, entitled "R. Stanley Dollar, et al. vs. Emory S. Land, et al., defendants", Civil Action No. 31468. Said R. Stanley Dollar, Dollar Steamship Line and H. M. Lorber are defendants here. The complaint in that action alleged the said agreement of August 15, 1938 and the transfers made thereunder on or about October 26, 1938, and further alleged that said transfers were made by way of pledge to secure a debt to the United States which was fully paid by the end of 1943. It also alleged that the United States Maritime Commission was without legal authority or power in law to acquire outright title to the shares.

4. In December 1945, the District Court for the District of Columbia, acting sua sponte, dismissed said action No. 31468, hereafter referred to as Dollar vs. Land. The plaintiffs there appealed to the

United States Court of Appeals for the District of Columbia. On March 18, 1946, that court made and entered its decision reversing the judgment of dismissal. The decision and opinion of said Court of Appeals are reported at 154 F. 2d 307 and are incorporated herein by reference. Thereafter the United States Supreme Court issued a writ of certiorari to review said decision, and on April 7, 1947, the Supreme Court affirmed said decision of said Court of Appeals. The decision and opinion of the United States Supreme Court are reported at 330 U. S. 731 and are herein incorporated by reference.

5. The said cause was then remanded to the District Court for the District of Columbia. The defendant The Robert Dollar Co. had in the meanwhile succeeded to all rights, title and interest of The J. Harold Dollar Estates Company, and William W. Smith, Richard Parkhurst, Grenville Mellen and J. K. Carson, Jr. had become members of the United States Maritime Commission after November 6, 1945. On May 27, 1947, defendant The Robert Dollar Co. was substituted as plaintiff in Dollar vs. Land in the place and stead of The J. Harold Dollar Estates Company, and said Smith, Parkhurst, Mellen and Carson were added as defendants. Thereafter and on July 29, 1947, answer was filed and issue joined. In said answer it was alleged that by virtue of said agreement of August 15, 1938 and the transfers made pursuant thereto on or about October 26, 1938, the United States had acquired absolute title and ownership of said shares.

On February 4, 1948, after months of negotiation the attorneys for the plaintiffs therein and the Acting Assistant Attorney General and a Special Assistant to the Attorney General, handling the case on behalf of defendants under authority of the Attorney General of the United States, executed and filed a "Stipulation of Facts". Exhibit 1 to the Request for Admission of Facts filed herein by these defendants concurrently with this Answer is a true and certified copy of said stipulation and is incorporated herein by reference.

6. Thereafter Dollar vs. Land was tried in the United States District Court for the District of Columbia. On May 31, 1949, the court rendered its judgment against the plaintiffs therein and in favor of defendants therein, the court adopting as its findings its opinion which is reported at 82 F. Supp. 919. Thereupon plaintiffs therein appealed to the United States Court of Appeals for the District of Columbia Circuit. On July 17, 1950, that court duly made and entered its decision reversing the decision of the District Court and ordered judgment in favor of plaintiffs and against defendants for the recovery of possession of the said shares. The decision and opinion of said Court of Appeals are reported at 184 F. 2d 245 and are incorporated by reference in this answer. By mutual agreement of the attorneys for the plaintiffs and appellants therein and the attorneys in the Department of Justice acting under authority of the Attorney General and on behalf of appellees, a Joint Appendix to the briefs of the parties in said Court of Appeals was

prepared and filed in said court pursuant to its Rule 17(a) as and for the record in said cause. Exhibit 2 to the Request for Admission of Facts filed herein by these defendants is a true and certified copy of said Joint Appendix and is incorporated herein by reference. Said Joint Appendix correctly sets forth proceedings in *Dollar vs. Land* from the filing of the mandate on May 8, 1947 through the filing of Notice of Appeal on April 28, 1949 and the perfecting of the record on appeal in June, 1949, including the amended complaint and all subsequent pleadings, various stipulations, opinion and findings of the trial court, judgment, and evidence offered and received at the trial.

7. The said Court of Appeals held, decided and adjudged that said agreement of August 15, 1938 was for a pledge only, and that the transfers of said shares made pursuant thereto were a pledge only, to secure a debt to the United States which was paid in full by the end of 1943; that no court of equity could treat the transfer of the shares other than as a pledge, that no other construction of the transaction was tenable if the transaction had been between private parties, and that the transaction could not have a different essential nature merely because a government agency had been a party.

8. Thereafter the Solicitor General of the United States petitioned the United States Supreme Court for a writ of certiorari to review said decision and judgment. On November 13, 1950, the United States Supreme Court denied the petition.

9. On November 17, 1950, the mandate of said

Court of Appeals was filed in the United States District Court for the District of Columbia, and on December 11, 1950, pursuant to the mandate final judgment was entered in said District Court in favor of the plaintiffs and against the defendants.

10. Before the entry of said judgment, Newell A. Clapp, Acting Assistant Attorney General, Edward H. Hickey and Donald B. MacGuineas, Attorneys, Department of Justice, appeared in the names of the defendants in said action and in the name of Charles Sawyer, the Secretary of Commerce of the United States, who, under Reorganization Plan No. 21 of 1950 had on May 24, 1950 succeeded to certain powers and functions of the United States Maritime Commission, opposed entry of judgment in favor of plaintiffs therein, and sought entry of a judgment of dismissal. On December 12, 1950, the same attorneys appeared in said District Court in the names of the United States, and of Charles Sawyer, Secretary of Commerce, and moved to vacate the judgment, which was denied. Subsequently the same attorneys, in the names of the United States and Charles Sawyer, Secretary of Commerce, and of the defendants appealed the judgment to the United States Court of Appeals for the District of Columbia Circuit. On January 31, 1951, that Court of Appeals made and entered its decision dismissing the appeals of the United States and of Charles Sawyer, Secretary of Commerce, modified the judgment of the District Court and ordered the cause remanded to the District Court for entry of judgment in the exact form specified by the said Court

of Appeals. All the proceedings in the cause from the filing of the mandate of the Court of Appeals in the District Court on November 17, 1950 through the decision and opinion of the Court of Appeals on January 31, 1951, including said decision and opinion, are correctly shown in the Transcript of Record and Supplemental Transcript of Record in said cause in the United States Supreme Court under Docket No. 552, October Term, 1950. True copies of said Transcript and Supplemental Transcript were received in evidence herein on April 4, 1951 in proceedings on plaintiffs' motion for preliminary injunction, consolidated by order of April 2, 1951 with certain proceedings in Action No. 30407 and marked Dollar Plaintiffs' Exhibits 6 and 5, respectively. Said two exhibits are incorporated in this answer by reference.

11. Following said decision of January 31, 1951, the Solicitor General of the United States filed two petitions in the Supreme Court of the United States, (1) for a writ of certiorari to review said decision and judgment of January 31, 1951, and (2) for leave to file a petition for rehearing of the denial of the petition for writ of certiorari to review the judgment and decision of July 17, 1950. On March 12, 1951, the United States Supreme Court denied both petitions.

12. On March 15, 1951, the mandate of the said Court of Appeals was filed in the United States District Court for the District of Columbia. On March 16, 1951, said District Court duly entered its final judgment, a true copy of which is attached hereto,

marked Exhibit 1 and made a part hereof. On the same day the said District Court entered a certain enforcement order, a true copy of which is attached hereto, marked Exhibit 2, and made a part hereof.

13. Thereupon, on March 16, 1951, said Newell A. Clapp, Edward H. Hickey and Donald B. MacGuineas, in the names of the defendants and of Charles Sawyer, Secretary of Commerce, appealed both said judgment and said order to the United States Court of Appeals for the District of Columbia Circuit. On April 4, 1951, upon motion of the plaintiffs and appellees in said case to dismiss the appeals as frivolous, each of the appeals was dismissed.

14. At all times after the decision of the United States Supreme Court on April 7, 1947, the Attorney General of the United States and those acting under his supervision in the Department of Justice handled said case, *Dollar v. Land*, on behalf of the defendants therein. Said Attorney General and those acting under his supervision in the Department of Justice appeared for and in the name of the defendants, filed the answer in their name, filed and executed all stipulations in the cause, including stipulations covering evidence, prepared and tried the case in the names of the defendants, handled the cause on the several appeals and the several proceedings in the United States Supreme Court in the names of the defendants and of Charles Sawyer, Secretary of Commerce, and in the name of the United States, as hereinabove alleged. All acts whatsoever performed, done or committed at every stage

of the proceedings in the name of the defendants have been handled by said attorneys.

15. Throughout said litigation from first to last said attorneys handled the case in the name of the defendants and asserted that they were doing so as government counsel.

16. Throughout said litigation from first to last the defense was conducted at the expense of the Treasury of the United States.

17. The Attorney General and the Department of Justice completely took over the defense of said action and controlled and handled it to the complete exclusion of anyone else and sought an adjudication that the agreement of August 15, 1938 and the transfers made pursuant thereto on or about October 26, 1938 were not a pledge but an outright transfer of title and ownership to the United States, and that the United States thereby became, was and is the owner of said shares.

18. The defense of the case was conducted by and under the Attorney General of the United States for the benefit of the United States and for it as the real party in interest, and it was so conducted to the knowledge of the courts and of all parties to the cause. Throughout said litigation from first to last the United States has been the real party in interest on the side of the defendants.

19. By reason of the facts stated above, the plaintiff herein in the instant cause, to wit, the United States, is conclusively estopped from asserting that the said agreement of August 15, 1938 and the transfers of the shares made thereunder on or

about October 26, 1938 were anything but a pledge to secure a debt since paid.

20. And by reason of the facts stated above, the final judgment in *Dollar v. Land* is *res judicata* as against the plaintiff, that the said contract of August 15, 1938 and the transfer of the shares made thereunder were by way of pledge only, that the debt secured thereby has long since been paid, and that the defendants herein, to wit, R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber are the owners of said shares.

Sixth Defense

1. These defendants incorporate herein with the same force and effect as if here set forth in full the allegations of paragraphs 1 and 2 of the Third Defense and paragraphs 2 to 18, inclusive of the Fifth Defense.

2. On December 7, 1950, the Acting Assistant Attorney General of the United States and other attorneys in the Department of Justice, acting under the authority of the Attorney General of the United States and purportedly on behalf of and in the name of Charles Sawyer, Secretary of Commerce of the United States, in his capacity as Secretary of Commerce, appeared in the United States District Court for the District of Columbia in said *Dollar v. Land*, asserted the alleged title of the United States to said shares, on that ground objected to the entry of any judgment in favor of plaintiffs therein, and prayed for a judgment dismissing the action. Thereafter the said District Court having on December 11, 1950 made and entered its judgment in favor of

the plaintiffs therein, as alleged above, the Attorney General, by and through the said Acting Assistant Attorney General and other attorneys in the Department of Justice, again appeared in the said District Court both on behalf of and in the name of Charles Sawyer as Secretary of Commerce and in the name of the United States, the plaintiff here, and filed motions to set aside and vacate judgment, again asserting the alleged title and ownership of the United States. Said motions being denied on December 15, 1950, the Attorney General, acting by and through the said Acting Assistant Attorney General and said attorneys in the Department of Justice, in the name of said Charles Sawyer as Secretary of Commerce and in the name of the United States, appealed to the United States Court of Appeals for the District of Columbia Circuit. These several appearances of Charles Sawyer, Secretary of Commerce, and of the United States, although denominated special, in fact constituted a general appearance in the cause, an assertion of title in the United States, an intervention by and in its behalf, and an affirmative subjection by it to the record and to the judgment in the cause.

3. By reason of the facts stated above, the plaintiff herein in the instant cause, to wit, the United States of America, is conclusively estopped from asserting that the said contract of August 15, 1938 and the transfers of the shares made thereunder on or about October 26, 1938 were anything but a pledge to secure a debt since paid.

4. And by reason of the facts stated above, the

final judgment in *Dollar v. Land* is *res judicata* as against the plaintiff, that the said contract of August 15, 1938 and the transfer of the shares made thereunder were by way of pledge only; that the debt secured thereby has long since been paid, and that the defendants herein, to wit, R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber are the owners of said shares.

Seventh Defense

1. These defendants incorporate herein with the same force and effect as if here set forth in full the allegations of paragraphs 1 and 2 of the Third Defense, 2 to 18, inclusive, of the Fifth Defense, and 2 to 4, inclusive of the Sixth Defense.

2. By reason of the facts alleged above, the Attorney General of the United States and all attorneys acting under and through him, including the attorneys who have instituted the present suit, lack authority in law to file the instant suit for and on behalf of the United States.

Eighth Defense

1. These defendants incorporate herein with the same force and effect as if here set forth in full the allegations of paragraphs 1 and 2 of the Third Defense, paragraphs 2 to 18, inclusive, of the Fifth Defense, and paragraphs 2 to 4, inclusive, of the Sixth Defense.

2. On June 10, 1947, in said *Dollar v. Land*, the plaintiffs therein, namely, R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and

H. M. Lorber, defendants in the present action, on the one hand, and the Attorney General of the United States, acting through the Assistant Attorney General, Peyton Ford, entered into and executed a stipulation as follows:

“Stipulation and Agreement

“It is hereby stipulated and agreed by and between the parties hereto that until the final determination of this case, the defendants will not, nor will any of them, either directly or through any agents, assistants, deputies, or employees sell, transfer, or otherwise dispose of the possession or custody of any of the shares of stock which are the subject matter of this suit or of any of the certificates representing said shares of stock unless prior thereto they shall have given to the plaintiffs at least twenty days notice in writing of their intention to do so, so that plaintiffs may have an opportunity to apply to the Court for a restraining order or an injunction pendente lite or both; but defendants shall not be deemed by this stipulation to have consented to the entry of such an order or injunction. By so stipulating, the defendants shall not be deemed to have represented that they or any of them had or now have possession or custody of any of the certificates of stock which are the subject matter of this suit or any power or authority to sell, transfer, or otherwise dispose of said certificates.”

3. On June 11, 1947, said United States District Court entered an order upon said stipulation mak-

ing it an order of the said court, and the stipulation and order were filed.

4. If the plaintiff in the present suit desired or wished to assert any claim whatsoever to said shares of stock or any of them, its sole recourse was to appear and intervene in the said action. It was without right or power to institute the present independent suit, and this Court is without jurisdiction to entertain it.

Ninth Defense

The complaint fails to state a claim upon which relief can be granted against these defendants or any of them.

Tenth Defense

1. These defendants incorporate herein with the same force and effect as if here set forth in full the allegations of paragraphs 1 and 2 of the Third Defense and paragraphs 2 to 13 of the Fifth Defense.

2. The shares of stock involved in this case are the identical shares involved in *Dollar v. Land*. These defendants were the plaintiffs in *Dollar v. Land*. The agreement of August 15, 1938 referred to in the complaint herein is the same agreement as the agreement of August 15, 1938 involved in *Dollar v. Land*. The transfer of the shares in 1938 to the United States Maritime Commission or the United States involved in this case are the same transfers as involved in *Dollar v. Land*. The issue in this case whether the agreement was for a pledge or for an outright transfer of ownership and whether the transfers were in pledge only or by way

of outright passage of ownership is the same issue as involved in *Dollar v. Land*.

3. The facts proved on the trial in *Dollar v. Land* concerning the nature and effect of said agreement and transfers are the identical facts which can be established in the present case by any party and there can be no other material or relevant facts or evidence.

4. The final decision and adjudication in *Dollar v. Land* that the transfers were in pledge and that the United States never acquired ownership and that the plaintiffs there, these defendants here, and their predecessors never parted with ownership to the United States is therefore controlling here, no genuine issue of fact exists in the instant case, and the issue tendered by the complaint is spurious.

Wherefore, these defendants pray that the complaint be dismissed with prejudice, and for such other and further relief as may be meet and proper in the premises.

/s/ HERMAN PHLEGER

/s/ GREGORY A. HARRISON

/s/ MOSES LASKY

/s/ ALVIN J. ROCKWELL

/s/ BROBECK, PHLEGER &
HARRISON

Attorneys for defendants R. Stanley Dollar, Dollar
Steamship Line, The Robert Dollar Co. and
H. M. Lorber.

EXHIBIT 1

[Title of District Court and Cause No. 31468.]

ORDER ON MANDATE MODIFYING
FINAL JUDGMENT

This Court having on December 11, 1950 made and entered herein its order on mandate and final judgment, and appeals having been taken therefrom to the United States Court of Appeals for the District of Columbia Circuit from said order on mandate and final judgment so made and entered as aforesaid and the said last-named Court having rendered its decision on January 31, 1951 wherein and whereby it modified the said order on mandate and final judgment of this Court and directed this Court to enter judgment in accordance therewith, and having issued its mandate accordingly.

Now, Therefore, it is hereby ordered, adjudged and decreed as follows:

1. That in conformance with and obedience to the said mandate of the Court of Appeals, the judgment of this Court of the 2nd day of December, 1948, is hereby vacated.

2. That Plaintiffs are entitled to possession of the shares as against Defendants*, and the Defendants are ordered and directed to deliver forthwith to the Plaintiffs the said shares. The possession to which Plaintiffs are entitled is an effective possession of the shares. In so far as such right requires

action on the part of Defendants in addition to physical delivery of the certificates, such action is hereby directed to be taken. Plaintiffs are entitled under this judgment to all rights belonging to possessors of the shares. Plaintiffs are further entitled, as provided by Rule 70 of the Federal Rules of Civil Procedure, 'to a writ of execution or assistance upon application to the clerk of this Court, if such writ becomes necessary'.

*Plaintiff Dollar Steamship Line 2,100,000 shares of the B Stock and 2,075 shares of the A Stock; Plaintiff R. Stanley Dollar 51,174 shares of the A Stock; Plaintiff The Robert Dollar Company 37,722 shares of the A Stock; Plaintiff H. M. Lorber 9,174 shares of the A Stock.

Dated: March 16, 1951.

/s/ MATHEW F. McGUIRE, Judge.

Seen:

/s/ EDWARD H. HICKEY,
Attorney, Department of Justice,
Attorneys for Defendants.

A true copy. Test:

[Seal] HARRY M. HULL, Clerk,
By /s/ H. N. GRAVES,
Deputy Clerk.

[Endorsed]: Filed Mar. 16, 1951.

EXHIBIT 2

[Title of District Court and Cause No. 31468.]

ORDER

Order on mandate modifying final judgment having been entered herein on March 16, 1951, decreeing and adjudging that plaintiffs are entitled to possession of the shares of stock herein involved,

And it appearing that under said order on mandate, Charles Sawyer is under the duty to deliver to plaintiffs the certificates of stock of American President Lines, Ltd. herein involved, to wit

Certificate of Dollar Steamship Line, Inc., Ltd. No. BX 26 for 2,099, 994 shares of Class B Stock;

Certificate of Dollar Steamship Lines, Inc., Ltd. No. BX 27 for 1 share of Class B Stock;

Certificate of Dollar Steamship Lines, Inc., Ltd. No. BX 28 for 5 shares of Class B stock;

Certificate of Dollar Steamship Lines, Inc., Ltd. No. AX 10 for 63,893 shares of Class A stock; and

Certificate of American President Lines, Ltd., No. A 150, for 49,313 shares of Class A stock.

And it further appearing that under said order on mandate plaintiffs are entitled not merely to possession of the certificates but to possession of the shares evidenced thereby;

And it further appearing that said order on mandate provides that "The possession to which plain-

tiffs are entitled is an effective possession of the shares”;

And it further appearing that said order on mandate provides that:

“In so far as such right requires action on the part of defendants in addition to physical delivery of the certificates, such action is hereby directed to be taken. Plaintiffs are entitled under this judgment to all rights belonging to possessors of the shares”;

And it further appearing that by the decision rendered by the United States Court of Appeals for the District of Columbia Circuit on January 31, 1951 said Court held that:

“If the Secretary of Commerce now has custody or possession of the shares, he obviously acquired such custody or possession since the beginning of this action, indeed since the order of July 11, 1947. Obedience to the order about to be entered pursuant to this opinion, is therefore, enforceable against him, and he is liable under Rule 71, *supra*, to the same process for enforcing obedience to that order as if he were a party”;

And it further appearing that said Court of Appeals held in said decision of January 31, 1951 that:

“The District Court is directed to enforce obedience to the judgment herein directed to be entered by it, by whatever process may become appropriate”;

And it further appearing that under Rule 70,

RCP, and under the powers of the Court as a Court of Equity, if the Court directs a party to perform any act and the party fails to perform it within the time specified the court may direct the act to be done by some other person appointed by the Court and the act when so done has like effect as though done by the party;

Now, Therefore, it is hereby ordered as follows:

1. Said Charles Sawyer shall endorse each of said stock certificates in blank by signing thereon in the place provided for endorsement "United States Maritime Commission, by Charles Sawyer, Secretary of Commerce," and shall forthwith deliver them to the plaintiffs. Such delivery may be made to Moses Lasky, one of plaintiffs attorneys.

2. If said Charles Sawyer delivers said certificates to plaintiffs or to said Moses Lasky, without having endorsed them, the clerk of this court shall, at the request of any of the attorneys of the plaintiffs, endorse each of said certificates in blank, signing them "United States Maritime Commission, by Harry M. Hull, Clerk of the United States District Court for the District of Columbia," and shall attach to each of said certificates a certified copy of this order and a certified copy of the above order on mandate modifying final judgment and shall forthwith return said certificates to the plaintiffs through their attorneys.

3. Said Charles Sawyer shall also forthwith by telegram instruct American President Lines, Ltd., its President, Secretary and Directors to transfer

all the B Stock, and 100,145 shares of the A stock of American President Lines, Ltd. to the plaintiffs in the amounts specified in the above mentioned order on mandate, and to make such transfers of record prior to said annual meeting.

4. In the event the said Charles Sawyer fails by 9:00 a.m., on March 17, 1951 to give to the Clerk and to plaintiffs attorneys at Room 432 Shoreham Building, Washington, D. C. proof satisfactory to said attorneys that he has complied with the provisions of paragraph 3 above, the Clerk of this Court shall forthwith give American President Lines, Ltd., its President, Secretary and Directors at 311 California Street, San Francisco 4, California the following instructions and advice:

That said American President Lines, Ltd., its President, Secretary and Directors are instructed to transfer all said shares of stock of record to the plaintiffs in the amounts specified in the said order on mandate, and to do so prior to the annual meeting of American President Lines, Ltd. on Monday, March 19, 1951; and

The Clerk shall give said advices and instructions by telegram or teletype so that they may reach their destinations prior to the said annual meeting of March 19, 1951. The Clerk may give said instructions and advices by sending to American President Lines, Ltd., its President, Secretary and Directors by telegram or teletype a copy of said order on mandate and a copy of this order together with a statement that the instructions commanded to be

given by this paragraph 4 of this order shall be deemed thereby to have been given.

Costs of said advices and instructions to be paid by plaintiffs.

Dated March 16, 1951.

/s/ MATTHEW F. McGUIRE,
United States District Judge.

Certified a true copy.

Test:

HARRY M. HULL, Clerk
By H. N. GRAVER, Deputy Clerk

[Endorsed]: Filed Mar. 16, 1951.

EXHIBIT No. 3

United States Court of Appeals for the District
of Columbia Circuit

No. 10,955

Emory S. Land, et al., Appellants,
vs.

R. Stanley Dollar, et al., Appellees.

No. 10,956

Charles Sawyer, Secretary of Commerce,
Appellant,
vs.

R. Stanley Dollar, et al., Appellees.

OPINION ON PETITION FOR RULE
TO SHOW CAUSE

April 11, 1951

Before Clark, Wilbur K. Miller and Prettyman,
Circuit Judges.

Prettyman, Circuit Judge: Many reasons impel us to state formally on the record the considerations which led us on Friday last to order the present respondents to show cause why they should not be held in contempt of the court. We do so before we hear the parties in response to the rule, and thus before we even begin to consider whether they are guilty of the charges made against them by their adversaries. The issuance of the rule was itself a

Exhibit No. 3—(Continued)

step to be taken only upon the most valid and compelling grounds. The parties are entitled to know the reasons for the citation, regardless of whether they are guilty or not guilty.

This is the fourth time this case has been before us. It has been before the Supreme Court three times. The first time, that Court, without dissent, rendered an opinion which has been the guide for every subsequent action of this court. The second and third times, the Supreme Court refused to grant certiorari when the United States, Secretary Sawyer, and the respondent parties to the litigation petitioned it to review and reverse judgments of this court. Nevertheless, we have once more carefully reviewed the whole course of the litigation, have reexamined the pertinent authorities, and have meticulously searched again the directive of the Supreme Court in respect to the case. We embarked upon that task even though the result might be merely to bring fresh finality to what has already been established.

I.

We must first recall the sequence of events. Prior to 1938 the Dollar Steamship Lines encountered financial difficulties due to the depression and strikes in the industry. It had borrowed money from the United States Maritime Commission (or its predecessor, the Shipping Board), which had been authorized by statute to make such loans and to accept and handle collateral therefor. The company needed more money and applied for and received it, making

Exhibit No. 3—(Continued)

its total debt to the Commission some \$7,500,000. Prior to that time the debt had been guaranteed by personal sureties. When the last loan was made, the Commission released those sureties and the Dollar stockholders endorsed and delivered to the Commission certificates for 92% of the stock. The Commission caused new certificates to be issued in the name of the "United States Maritime Commission". The Commission took over management of the company. With the war, prosperity came to the company. By 1945 its entire debt had been paid in full with interest. The former Dollar stockholders thereupon demanded the return of their stock. The demand was refused, and they brought against the members of the Maritime Commission a suit in the nature of an action to redeem collateral, praying the return of the shares. The District Court of its own motion dismissed the suit as being one against the United States and therefore not to be entertained without its consent.

Upon appeal this court, in an exhaustive opinion by Judge Clark, held that in order to determine whether or not the United States was a necessary party it was necessary to determine, by taking evidence, whether the shares were property of the United States; and that that question depended upon whether the transaction in 1938 was an outright transfer, as claimed by the Commission, or was a pledge of collateral for a loan, as claimed by the company. *Dollar v. Land*, 81 U. S. App. D. C. 28, 154 F. 2d 307 (1946). Certiorari being granted,

Exhibit No. 3—(Continued)

the Supreme Court unanimously affirmed that judgment in an opinion by Mr. Justice Douglas which we shall discuss in detail in a moment. *Land v. Dollar*, 330 U. S. 731 (1947).

Trial was thereupon had in the District Court, and the ensuing judgment (*Dollar v. Land*, 82 F. Supp. 919 (D. C. 1948)) was appealed to this court. We held that the 1938 transaction was a pledge and directed the District Court to order the return of the shares. *Dollar v. Land*, 87 U. S. App. D. C.—, 184 F. 2d 245 (1950). The Supreme Court denied certiorari. *Land v. Dollar*, 340 U. S. 884 (1950). Pursuant to our mandate the District Court entered its order, but added a recital that its judgment was determinative of the title to the shares.

Meantime, the Maritime Commission had been abolished by a Presidential Reorganization Plan and the Secretary of Commerce had succeeded to possession of the shares. He announced that fact to the District Court, appearing specially and stating that he was not submitting himself to the jurisdiction of that court. He appealed from the order entered. The United States also appeared specially in the District Court, stating that it was not submitting itself to the jurisdiction of the court, and appealed from the order. The former members of the Maritime Commission also appealed.

This court held that the judgment should be restricted to possession of the shares, and we directed the District Court to enter an order which we prescribed in exact terms. *Land v. Dollar*, U. S. App.

Exhibit No. 3—(Continued)

D. C., Jan. 31, 1951. That decree, as included in our mandate, was that the Maritime Commission, or its successor in possession, deliver to the Dollar interests the effective possession of the shares and that they perform whatever acts were necessary to transfer such possession. The Supreme Court denied certiorari. *Land v. Dollar*, 19 U. S. L. Week 3245 (U. S. March 12, 1951).

The District Court thereupon, on March 16, 1951, entered the order which we had directed. It also included, by way of specification, directions that the officials then in possession of the shares endorse the certificates and order the transfer of the shares upon the record books of the corporation. The court added that, if this endorsement were not made and these instructions were not given by Sawyer, they would be made by the clerk of the court. The defendants in the action and Sawyer appealed to this court from that judgment. Those appeals are now pending here, and constitute the proceeding in which the present actions are being taken.

On March 16, 1951, Sawyer delivered the certificates for the stock to the representatives of the Dollars, but he refused to endorse them or to direct the transfer of the shares. On the same day, he executed a proxy in his own name as Secretary of Commerce, giving three employees of the Department of Commerce full power and authority to act for him and in his name as Secretary of Commerce at the annual meeting of the corporation to be held on March 19, 1951, and to vote "all shares of stock

Exhibit No. 3—(Continued)

which stood in the name of the United States Maritime Commission on Feb. 26, 1951". On March 18, 1951, Philip B. Fleming executed a similar proxy to the same three persons, signing the name of the United States Maritime Commission by him as Acting Secretary of Commerce.

It is alleged to us that the three persons having the proxies just described appeared at the annual meeting of the corporation, and that representatives of the Dollar interests also appeared with the certificates endorsed by the clerk of the court; that George Killion, presiding as president of the corporation, recognized the proxies of Sawyer and Fleming and refused to recognize the Dollar interests; and that the three proxies of Sawyer and Fleming then voted all these shares.

It is also alleged to us that Newell A. Clapp, an acting Assistant Attorney General of the United States, wired and wrote the transfer agent of the corporation, referring to the decision of this court and warning it not to take any action "in derogation of the title to said stock claimed by the United States."

It is further alleged to us that on March 12, 1951, Newell A. Clapp, Edward H. Hickey, Donald B. MacGuineas, and Philip H. Angell, officials of the Department of Justice, signed and caused to be filed in the United States District Court for the Northern District of California, complaint in the name of the United States; that in that complaint they prayed that the United States be declared the true and

Exhibit No. 3—(Continued)

lawful owner of the shares of stock in the Steamship Lines and to be entitled to the right to possession of the shares; that the Dollar interests be enjoined from exercising any rights or privileges as owners of the shares or demanding any new certificates for the shares. It is alleged to us that in that complaint it was stated, among many other statements of similar effect, that the United States "continues to be the true and lawful owner of said shares and certificates notwithstanding any judgments or proceedings in said action No. 31468 in the United States District Court for the District of Columbia". It is further alleged to us that in a motion for preliminary injunction filed in the foregoing suit in California on March 19, 1951, it was stated over the signature of Philip B. Angell and Donald B. McGuineas, attorneys in the Department of Justice, that the United States considers the judgment and decree of this court, holding the 1938 transaction to be a pledge, to be "a serious miscarriage of justice and for that reason has declined, by direction of the President, to acquiesce in it." That statement is alleged to be in paragraph 11, on page 7 at lines 9 to 11 of that motion.

The litigation being before this court upon appeals by the defendant former members of the Maritime Commission and by Charles Sawyer, the appellee Dollar representatives petitioned this court for sanctions against the persons now before us and for issuance of a rule to show cause in contempt directed to them, alleging as we have indicated vari-

Exhibit No. 3—(Continued)

ous acts of disobedience and defiance of our decree, and intentional attempts to nullify the decree which we directed the District Court in this jurisdiction to enter.

II.

We now examine the decision and opinion of the Supreme Court in *Land v. Dollar*, 330 U. S. 731 (1947), which opinion is the guide and the control in this controversy. In the course of its opinion, which was without dissent, the Court said:

“The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents’ property under the claim that it belongs to the United States. That conclusion would follow if either of respondents’ contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.

“If respondents are right in these contentions, their claim rests on their own right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort.

“If viewed in that posture, the case is very close to *United States v. Lee*, 106 U. S. 196.”

The Court then described the *Lee* case and summarized the ruling there made. It said:

“The Court affirmed the judgment over the ob-

Exhibit No. 3—(Continued)

jection that the suit was one against the United States. It held that the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action; that a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.' P. 219. It further held that while such an adjudication is not *res judicata* against the United States because it cannot be made a party to the suit, the courts have jurisdiction to resolve the controversy between those who claim possession. And it concluded that an agent or officer of the United States who acts beyond this authority is answerable for his actions. [Citing cases.]

“Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee*, *supra*, has been repeatedly approved. [Citing cases.] That rule is applicable here although we assume that record title to the shares is in the Commission. In *United States v. Lee*, *supra*, record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not *res judicata* against the United States, p. 222, it settled as between the parties the controversy over possession. Precisely the same will be true here, if we assume the allegations of the complaint are proved. For if we view the case in its

Exhibit No. 3—(Continued)

posture before the District Court, petitioners, being members of the Commission, were in position to restore possession of the shares which they unlawfully held.”

Then the Court laid down the course of the case at bar in the following language, upon which no amount of elaboration or explanation can improve:

“But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen’s realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

“It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be res judicata as

Exhibit No. 3—(Continued)

against the United States. See *United States v. Lee*, supra, p. 222.” (Emphasis supplied.)

No amount of argument can becloud the plain words—which we repeat for emphasis. The Court was speaking of the very case which is now once more before us. It said:

“* * * if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers.”

And again it said:

“* * * if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be *res judicata* as against the United States.”

Pursuant to that judgment of the Supreme Court, the case was tried on the merits in the District Court and then appealed to us. This court held, in *Dollar v. Land*, 87 U. S. App. D. C. —, 184 F. 2d 245 (1950), that the allegations of the complaint were established, that the transaction in 1938 was a pledge in the nature of collateral. The Supreme Court denied a writ of certiorari which the Government official sought.

It is crucial to the present problem to state precisely what that judgment of this court meant. We do so in the words of the Supreme Court opinion which we have discussed. It meant, according to the

Exhibit No. 3—(Continued)

Supreme Court, that “the shares of stock never were property of the United States”. It meant that the shares “are being wrongfully withheld by petitioners [that is, the Government officials] who acted in excess of their authority as public officers.” It meant that the Dollar interests “are entitled to possession of the shares as against petitioners”. So much is crystal clear beyond peradventure of doubt. In so far as the parties to this suit are concerned, it has been finally adjudicated by the courts that the shares were never property of the United States and that the Dollar interests are entitled to possession of them. Those are no longer litigable issues so far as these parties, their privies, agents, representatives and attorneys are concerned.

What then is the meaning of the further holding of the Court that “the judgment would not be res judicata as against the United States”? Obviously it meant that, although the judgment would determine the issues between the parties, it would not determine them so far as the United States, as such, separate and apart from the officer-parties to the suit, is concerned. And the Court pointed to the source wherein lies the explanation. It said “See *United States v. Lee*, *supra*, p. 222.”

III.

We must turn then to examine *United States v. Lee*, 106 U. S. 196 (1882). This was an action brought by George W. P. C. Lee, as devisee of his grandfather, George Washington Parke Custis, to

Exhibit No. 3—(Continued)

recover possession of what is now Arlington Cemetery. The defendants were officers of the United States in possession of the property by designation in the course of official duty. The Attorney General of the United States, appearing only for the purpose of the motion, and without submitting the United States to the jurisdiction of the court, moved that the case be dismissed, upon the ground that the property was held and occupied by the United States as public property for public uses, and by virtue of a certificate of sale to the United States, under which the claim of title of the United States had been duly recorded. The title relied on by the defendant-officers was a tax-sale certificate, certifying that the land had been bid in by the United States at a tax sale.

In the trial court a jury determined that no title had been acquired by the United States under the tax-sale proceedings. The Supreme Court held that there was no error in that process of determination. Then the Court turned to consider the proposition asserted by the United States and by its officers that, though a jury had ascertained that what was set up in behalf of the United States was no title at all, the court could render no judgment in favor of Lee because the officers held the property as agents of the United States and it had been appropriated to public uses. The proposition rested on the principle that the United States could not be sued without its consent.

The Court examined at great length the cases on

Exhibit No. 3—(Continued)

the subject and stated with eloquent comment its reasoning in respect to it. There was ample authority for, and the Court found the cases to be unanimous in, the conclusion that an individual private citizen who could establish a valid title to property held by agents of the United States could recover possession of that property even though the United States claims title and refuses to become a party to the suit.

The Court then said:

“Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.”

And, proceeding further the Court said:

Exhibit No. 3—(Continued)

“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

“It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

“Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

“If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has

Exhibit No. 3—(Continued)

a just claim to well-regulated liberty and the protection of personal rights.

“It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed.”

Then the Court said:

“Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr v. United States*, already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.

Exhibit No. 3—(Continued)

Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution.”

The respondents now before us have thus far rested their rights in large part upon one sentence in *United States v. Lee*, and particularly upon the latter clause of it. That sentence is “Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained.” Respondents say that that statement means that the United States is entitled to an injunction permitting its agents to retain possession of property despite a final order of a court of competent jurisdiction ordering those agents to surrender possession.

The *Lee* case could not possibly have that meaning. The whole opinion of the Court is eloquent to the contrary effect. The reference to an injunction clearly means that, possession having been delivered pursuant to court decree, and a suit to quiet title having been instituted by the United States, the new and lawful possessors might then be enjoined from acts which might impinge upon the eventual rights of the claimant to the title; such acts might be, for example, the destruction of the property or its sale or transfer. The point is that the injunctive

Exhibit No. 3—(Continued)

relief ancillary to the suit to quiet title may be in aid of that suit, but most positively it cannot be in nullification of a final decree entered by a competent court disposing of possession. Such a nullifying order would most clearly not be what the court meant by “a proper case”. An ancillary order pendente lite cannot be in complete conflict with a final decree already entered. If it were, the unadjudicated claim of the plaintiff in the later case would be given precedence over the right finally awarded in the earlier case. Such reverse order cannot be correct. Respondents argue that because they are entitled to an injunction in “a proper case”, they are entitled to any injunction which they might seek. That is not the law, in our opinion. To sustain that contention would be to declare that one court can nullify the final decrees of another court which had jurisdiction,—a holding which would mean chaos and the complete collapse of every semblance of orderly judicial process, a consummation to the irreparable damage of the public interest.

It is noteworthy that in the Lee case the Government, having regard for the substance rather than the form of the court proceeding, did not attempt to re-litigate the title, as the Court said it had a right to do, but instead paid the Lees their asked price for the property.

IV

We now come to a consideration of what these respondents are alleged to have done.

In the first place we must note that if it be

Exhibit No. 3—(Continued)

proved that respondents acted in a common plan and design, no fine distinctions need be attempted between specific acts done by one or the other in pursuance of that plan. Those who superintended or advised are chargeable equally with those who actually performed. In the next place it is clear enough that a person who is the bona fide legal possessor of shares of stock is entitled to have certificates in his own name and to have those certificates recorded. This would seem to be particularly true where he is in possession by virtue of a final decree of a court of competent jurisdiction; and still more particularly so where he has established his ownership of the shares and has a valid judgment of the courts to that effect, except for one claimant which has an unadjudicated claim to title. It must be remembered in considering any pertinent niceties of corporation law that the Dollar interests have been adjudicated to be the owners of these shares. The single omission in the complete finality of our decree for all purposes here pertinent is that it was not *res judicata* against the United States; the United States has an unadjudicated claim to title. It is in the light of those generalities that we examine what is alleged.

It is alleged that respondents refused to endorse the certificates and refused to instruct the transfer agent to transfer the shares. It is true that they delivered the unendorsed certificates and that the clerk of the court made the endorsement and gave the instructions. Petitioners for the rule to show

Exhibit No. 3—(Continued)

cause say several things about that. First, it is alleged by petitioners that, if respondents had endorsed the certificates and had issued the instructions in good faith, the transfer would have been carried out; what the officials failed to do was effective in preventing the transfer. Second, it is alleged that, after the endorsement and instruction of the clerk had proved ineffective, respondents could then have made the endorsement and given the instructions and the transfer would have occurred; this failure to act was also effective in preventing the transfer. Third, it is clear enough, without any allegations on the part of petitioners, that the decree of this court was directed at the shares of stock and not merely at pieces of paper called certificates, as respondents are alleged to have asserted.

It is next alleged that respondents executed proxies in their own names after the decree of this court was known to them. Copies of the alleged proxies in the papers before us do not show that they were executed in the name of the United States, which now claims to be the true and lawful owner. They appear to have been executed in the name of and on behalf of persons who were and are parties to this suit and to whom our decree was directed. They would appear to have been so executed because those persons, and not the United States, were and are the record holders of the shares.

It is next alleged that at the annual meeting of the corporation respondents refused to recognize the decree of this court, or the endorsements or in-

Exhibit No. 3—(Continued)

structions of the clerk of the District Court, but on the contrary recognized the proxies presented by respondents.

It is next alleged that respondents warned, in writing, the transfer agent of the corporation not to transfer the shares of stock.

It is next alleged that respondents sought and obtained from the District Court in Northern California an injunction against the Dollar interests, restraining them from attempting to secure compliance with the decree of this court. The bringing of that action by respondents, if proven, must be viewed in the light of the opinion of the Supreme Court in *Toledo Co. v. Computing Co.*, 261 U. S. 399 (1923). See *Steelman v. All Continent Corp.*, 301 U. S. 278. And see also *Holmes v. Rowe*, 97 F. 2d 537, 539 (9th Cir. 1938), and *Crosley Corporation v. Hazeltine Corporation*, 122 F. 2d 925, 928, (3rd Cir. 1941).

In the last place, respondents, using the epitome of contemptuous expression in respect to judicial action by characterizing the decree and judgment of this court as "a serious miscarriage of justice", are alleged to have announced, formally, in writing to a federal District Court, that they would not "acquiesce" in that judgment.

It is alleged that these various actions of respondents, separately and as a coordinated plan, constitute an attempt to defeat and nullify a decree finally entered by this court in the litigation, and thus constitute contempt of this court.

Exhibit No. 3—(Continued)

V

We now examine the suggestions and representations made to us in opposition to the issuance of a rule to show cause.

Whatever may have been the merits of the Government's claims prior to the final decision in this litigation, its claims as thus far represented to us do not appear to suggest a claim of present substance no matter from what viewpoint they are examined. Considered upon the plane of high policy and principle, petitioners picture the spectacle of a government which proclaims its adherence to law as the governing force among men, not only refusing for six years to submit to its own courts its own claim to private property derived from a purely commercial transaction, but endeavoring by every device to thwart and defeat the judgment of those courts after it has been rendered. The ownership of these shares of stock is not a high function of government; it would be at the most an operation by the Government in a commercial field. The Government officials before us are not here defending the right and duty of the Government to govern; they are asserting its right to own shares in a purely private commercial enterprise.

Considered upon the next lower level, i.e., legal issues upon the merits, the Government has not as yet been represented as advancing any claim which has not been finally adjudicated by the courts. The question whether the United States is the owner of this stock has been presented to the courts and has

Exhibit No. 3—(Continued)

been decided. The only basis thus far presented for the claim that the United States owns the shares is that the transaction in 1938 was an outright acquisition and not a pledge. That issue has been adjudicated to a final conclusion in a judicial proceeding in which the issue was properly before the court. We say "a final conclusion" because surely an issue which has been presented three times to an appellate court and three times to the Supreme Court ought to be considered finally concluded. In that proceeding officials claiming to act as agents of the United States in respect to these shares were parties. The Attorney General of the United States, through his deputies and assistants, was counsel. The United States appears to seek to assert nothing of substance which has not been asserted and adjudicated. What the United States seems to assert is the right knowingly to stand aloof throughout a judicial proceeding and, when issues have been finally decided adversely to its views, to reassert those same issues by its same agents and its same counsel in another proceeding in another court. Under the rules respecting the forms of legal proceedings, it has that right, but in the present instance the right involves nothing of undetermined substance. The claim as presently presented is a patent prostitution of a principle of high public importance, which is that the Government may not be sued without its consent lest a mass of unimpeded litigation interfere with the performance of governmental functions.

Exhibit No. 3—(Continued)

Considering the present posture of this case upon the next lower level, which we might describe as the level of non-legalistic appeal, it is clear enough that if the allegations were proved, the protest of the Government officers and their counsel to the effect that they did what they could to comply is without merit. Every person who would have had a part in the delivery of effective possession of these shares is represented as being under the actual control of these officers and these lawyers. John L. Lewis and the United Mine Workers Union made precisely that same sort of contention in the second case of contempt against them, which was before this court. *International Union, et al. v. United States*, 85 U. S. App. D. C. 149, 177 F. 2d 29 (1949). But we there held that, when upon the facts it was obvious that an authoritative word sincerely given by him and the Union would have been obeyed, they were guilty of contempt if the results showed that such word had not been given. The present case as thus far presented is even clearer than that. It would appear little less than absurd to say that, if the respondents presently before us had given authoritative instructions for the transfer, the transfer would not have occurred.

There are in the papers before us intimations of claims by the Government that the return of these shares would be an unjust enrichment of the Dollar interests. The idea is also reflected by the District Judge in California. The claim is in complete conflict with the most elementary concepts of the law

Exhibit No. 3—(Continued)

of bankruptcy and receivership. An illustration will clarify: A debtor runs into the red until his creditor becomes alarmed and asks a court to appoint a receiver. The court appoints a nominee of the creditor. The receiver turns out to be a good manager, or prosperity for other reasons comes to the business. The erstwhile bankrupt earns profits and pays off all its debts. The court discharges the receiver, with congratulations, and turns the company back to its original owners. There is nothing novel or startling in that procedure. It is one of the commonplaces of business life. It is not difficult to imagine what a court would rule if a receiver, after a successful administration of the affairs of a business concern and after the debts had been paid off, should assert that the return of the company to the original owners would be an unjust enrichment of those owners. It is indeed impossible to imagine such a receiver asserting a claim that, because he had been given management of a bankrupt concern and had produced a company with a valuable net worth, the company therefore now belonged to him. Merely to state such a claim is to demonstrate its absurdity. The whole purpose and philosophy of bankruptcy and receivership operation is to accomplish two purposes, (1) to pay off the debts and (2) to put the owner back on his feet and headed for a desirable prosperity.

The case before us is not materially dissimilar to the typical situation just pictured. The Maritime Commission was a lending agency similar in many

Exhibit No. 3—(Continued)

respects to the Reconstruction Finance Corporation. It loaned money to the Dollar Steamship Lines. The Lines went deeper into trouble. The Commission, being a creditor, took over the management. Its operation was successful. The debt was paid off in full, with interest. It is difficult to accept as serious a claim that because of those facts a return of the company to the full control of its owners would unjustly enrich them.

Of course, receivers like receiverships. Courts often have great difficulty in requiring a receiver to bring his labors to an end and release the property. That phase of this case is no novelty. But we do not find a reported case in which such a receiver asserts a right to retain the property because to release it would unjustly enrich the owner.

The District Judge in California referred to "the people's money", apparently meaning money derived from the Treasury of the United States. The only such money which, so far as the record shows, went into this operation was the money which was loaned to the company by the Commission, and which was repaid in full with interest.

Considering the situation on the lowest level of mere technicalities, there appears little to support the Government's claim in the papers thus far presented to us. This stock appears never to have been in the Government's name. The United States, as such, has not been shown to have been at any time the record owner of the shares. It is not alleged that any certificate of stock was ever issued to the United

Exhibit No. 3—(Continued)

States. The copies of the proxies in the record, alleged to have been executed on March 16th and March 18th, do not show execution by or in the name of the United States. The record stockholder was and still is the United States Maritime Commission. The certificates are alleged to have been and still to be in the name of the Commission. The proxies were executed by and on behalf of the Secretary of Commerce and the Commission. The claim of the United States appears to be that the Commission and the Secretary held the stock as its agents. But that particular claim has been finally adjudicated. Those very persons were parties (the Secretary being successor to the original parties) in the suit and their claim that they held the shares as agents of the United States was the very issue which was decided. That claim was the essence of the controversy. The courts have rendered a judgment which, in the words of the Supreme Court, was that the Commission and the Secretary in withholding the shares "acted in excess of their authority as public officers." While that judgment is not *res judicata* as to the United States, it is *res judicata* as to the Commission and the Secretary. And it is the Commission and the Secretary who have been ordered by this court to deliver possession of the shares. The claim of the United States does not appear to rest upon a record title or upon certificates issued to it, or upon any recorded fact whatever. It appears to rest upon a legal question of agency, and that ques-

Exhibit No. 3—(Continued)

tion has been decided in a suit in which those agents made that claim.

VI

We now come to an examination into the law concerning contempt of court in respect to orders issued by a court. That law has been recently stated in exhaustive detail by the Chief Justice of the United States, writing for the Supreme Court in *United States v. Mine Workers*, 330 U. S. 258 (1947).

That was a suit by the United States for a declaratory judgment. The defendants were John L. Lewis and the United Mine Workers Union. It appeared that Lewis had notified the members of the Union that the agreement with them, under which the coal mines were being operated, had terminated. The District Court issued an order restraining Lewis and the Union from continuing in effect that notice, from encouraging the miners to strike or to cease work, and from taking any action which would interfere with the court's jurisdiction and its determination of the case. Gradually the miners walked out. A rule to show cause why the defendants Lewis and the Union were not in contempt was issued, trial was had, a verdict of guilty was rendered, and both defendants were fined.

The Supreme Court first considered the applicability of the Clayton and Norris-LaGuardia Acts and then reached the question of the contempt of court. It referred to *United States v. Shipp*, 203 U. S. 563 (1906), and quoted as follows from Gom-

Exhibit No. 3—(Continued)

pers v. Bucks Stove & Range Co., 221 U. S. 418, 450 (1911):

“If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the ‘judicial power of the United States’ would be a mere mockery.”

The Court also said:

“Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In *Howat v. Kansas*, 258 U. S. 181, 189-90 (1922) this Court said:

‘An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decisions are to be respected, and disobedience of them is con-

Exhibit No. 3—(Continued)

tempt of its lawful authority, to be punished.'

Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, *Worden v Searls*, 121 U. S. 14 (1887), or though the basic action has become moot, *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 (1911).

"We insist upon the same duty of obedience where, as here the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt. The District Court on November 29 affirmatively decided that the Norris-LaGuardia Act was of no force in this case and that injunctive relief was therefore authorized. Orders outstanding or issued after that date were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise. Convictions for criminal contempt intervening before that time may stand."

The Court discussed the differences, both in nature and in proceedings, between criminal and civil contempt. It referred to civil contempt as remedial or coercive relief. It said, "We will not assume that the defendants were not instantly aware that a usual remedy in such a situation is to impose coercive sanctions until the act is performed. This is a function of civil contempt."

Exhibit No. 3—(Continued)

Later the Court said:

“Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers v. Bucks Stove & Range Co.*, supra, at 441. The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court’s order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant’s defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge.

* * * * *

“The trial court also properly found the defendants guilty of civil contempt. Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained. *Gompers v. Bucks Stove & Range Co.*, supra, at 448, 449. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon

Exhibit No. 3—(Continued)

evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

“But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.”

The Court said further:

“We are aware that the defendants may have sincerely believed that the restraining order was ineffective and would finally be vacated. * * * They had full opportunity to comply with the order of the District Court, but they deliberately refused obedience and determined for themselves the validity of the order. When the rule to show cause was issued, provision was made for a hearing as to whether or not the alleged contempt was sufficiently purged. At that hearing the defendants stated to the court that their position remained then in the status which existed at the time of the issuance of the restraining order. Their conduct showed a total lack of respect for the judicial process. Punishment in this case is for that which the defendants had done prior to imposition of the judgment in the District Court, coupled with a coercive imposition upon the defendant union to compel obedience with the court's outstanding order.”

The Court sustained a fine of \$700,000 and an additional fine of \$2,800,000 unless the defendant

Exhibit No. 3—(Continued)

Union within five days showed that it had fully complied with the court's order.

In concluding the Court made the following observation:

“We well realize the serious proportions of the fines here imposed upon the defendant union. But a majority feels that the course taken by the union carried with it such a serious threat to orderly constitutional government, and to the economic and social welfare of the nation, that a fine of substantial size is required in order to emphasize the gravity of the offense of which the union was found guilty. * * * Loyalty in responding to the orders of their leader may, in some minds, minimize the gravity of the miners' conduct; but we cannot ignore the effect of their action upon the rights of other citizens, or the effect of their action upon our system of government. The gains, social and economic, which the miners and other citizens have realized in the past are ultimately due to the fact that they enjoy the rights of free men under our system of government. Upon the maintenance of that system depends all future progress to which they may justly aspire. In our complex society, there is a great variety of limited loyalties, but the overriding loyalty of all is to our country and to the institutions under which a particular interest may be pursued.”

There can be little doubt of the teachings of that case. An order issued by a court having jurisdiction of the persons and subject matter must be obeyed, even though the defendants may sincerely believe

Exhibit No. 3—(Continued)

that the order is ineffective and will finally be vacated, even though the Act upon which the order is based is void, even though the order is actually set aside on appeal, even though the basic action becomes moot. This must be the rule, said the Chief Justice, because of the necessities of orderly process under our constitutional system of government. Those necessities override every feeling of loyalty to leaders, or doubt as to validity, or of outrage as to the determination, or of shock as to consequence.

The dissenting justices in that case did not dissent upon any point pertinent to the present proceeding. Mr. Justice Black, speaking for himself and for Mr. Justice Douglas, agreed that the court had power summarily to coerce obedience to its orders, and to subject defendants to such conditional sanctions as were necessary to compel obedience. They mentioned disobedience to an affirmative court order as a typical example of an offense which must necessarily be dealt with summarily. On these points the justices were unanimous in their view. Mr. Justice Murphy dissented because he was of opinion that the restraining order was void under specific declaration of the Congress in the Norris-LaGuardia Act, but he pointed out that no man can violate with immunity an order which lies within the recognized power of the court and which had not been validly prohibited by Congress.

Let us apply that decision to the allegations made in the matter now before us. The respondent parties are alleged to be making themselves judges of the

Exhibit No. 3—(Continued)

validity of the decree issued by the court. They believe that decree erroneous. They are alleged to believe that they can eventually in some other proceeding have the decree set aside. But none of those considerations, however sincerely entertained, can justify failure of the persons before us to comply with the decree, or minimize the duty of the court to compel compliance. The law which the courts applied to Lewis and the Miners is equally applicable to agents of the Government.

VII

We cannot conclude this statement of our views upon the situation presented to us upon the petition for the rule to show cause, without commenting upon some phases which appear to us more important than the mere ownership of a steamship line, however valuable.

There are almost always two sides to a controversy. The loser almost always thinks the court is wrong. The Department of Justice in this instance, although supposed to set the standard for the attitude and conduct of the bar toward the bench, appears upon the papers thus far before us to vent this well-nigh universal dissatisfaction at defeat by instigating an unseemly conflict between two courts, either of which might have had initial jurisdiction of the cause.

It must be kept in mind that the United States could have appeared in the District Court for the District of Columbia at any time while the litigation was in process there. It could have appeared there as readily, if not more readily, than in the District

Exhibit No. 3—(Continued)

Court for the Northern District of California. The Court here was as open to it as is the court there. The Department of Justice is alleged to have chosen not to appear here but to have chosen to await the decision here and then, if the result were unsatisfactory, to appear in another court upon precisely the same issues upon the same facts.

Of course judges differ in opinion, as other men do, and in the course of decision such differences frequently occur. In the established orderly processes those differences are resolved by a vote. The opinion of the majority becomes the rule in the case. It is not conceivable that a defeated lawyer should request a dissenting judge to attempt to exercise a power of injunction to stop the enforcement of the decree of his brethren. Different District Court judges frequently have the same question of law in different cases and frequently differ in opinion and conclusion upon the point. It is inconceivable that one such judge should attempt to nullify the conclusion of his brother already finally reached and formally entered in a case properly before him. Such an act on the part of a dissenting judge or of a different court not in the line of established appellate process, would be deemed to be an arrogant assumption of superiority not to be tolerated. No less deplorable, in our opinion, would be a deliberately designed action of the great legal department of the Government to attempt to throw into disorderly conflict two courts in respect to precisely the same controversy over the same facts. We have no authority

Exhibit No. 3—(Continued)

to control policies of the Department but we have a serious duty to express an opinion upon a course of action which would in our opinion tend to bring the courts into public disrepute.

We have twice in open court inquired whether respondents would now take the steps required by the decree.

Upon all the foregoing considerations and upon the papers and statements presented to us prior to Tuesday of this week in these appeals, we could see no course open to us except to issue upon these respondents a rule to show cause why they are not in contempt of this court.

All that we have here said concerns only the rule, which is a requirement that the respondent officials answer the charges. The time has not yet arrived for them to make their replies. We do not intend to intimate any view upon whether they are guilty or not guilty. But, as we said in the beginning of this opinion, the issuance of this rule was itself a step of such gravity that we felt that the parties are entitled to know exactly why it was taken.

It would be a most happy event if, upon a return to the rule, it should be shown to the court that the Government officers who are respondents here did not commit the contemptuous acts which the petitioners charge them with having committed, or if it should develop that respondents have now complied, or intend forthwith to comply, fully and unreservedly with the decree which has been entered.

Exhibit No. 3—(Continued)

The court awaits the return to its rule with both concern and hope.

Acknowledgment of Service attached.

[Endorsed]: Filed May 15, 1951.

[Title of District Court and Cause No. 30407.]

REQUEST FOR ADMISSIONS OF FACT

Pursuant to Rule 36 of the Rules of Civil Procedure, defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber, request plaintiff to admit, within ten days after service of this request, the truth of certain matters of fact as follows:

1. Accompanying this Request as Exhibit 1 is a copy, certified on March 27, 1951, of a "Stipulation of Facts" in the case of R. Stanley Dollar, et al., plaintiffs, v. Emory S. Land, et al., defendants, C. A. No. 31468 in the United States District Court for the District of Columbia, stipulated to on January 29, 1948 by the Department of Justice, and approved by that Court and filed on February 4, 1948. Plaintiff is requested to admit that each and every matter therein stipulated to be a fact is a fact.

2. Accompanying this Request as Exhibit 2 is a copy, certified on March 16, 1951, of the Joint Appendix (in 5 volumes) to the briefs of the parties in the case of R. Stanley Dollar, et al. v. Emory S. Land, et al. in the United States Court of Ap-

peals for the District of Columbia Circuit, No. 10299. Plaintiff is requested to admit:

(a) That said Joint Appendix was prepared and filed in said United States Court of Appeals pursuant to Rule 17(a) of the rules of said court, and that the attorneys for plaintiffs in said action and the Department of Justice agreed that it was the Joint Appendix and used it in said court as such pursuant to said Rule.

(b) That thereafter, with the addition of the proceedings in the Court of Appeals, it was used as the record in the United States Supreme Court by the Solicitor General of the United States on petitions for writ of certiorari in said cause and later on petition for rehearing.

(c) That it truly sets forth all orders, pleadings, opinions, judgment and all other matters which it purports to state.

(d) That all witnesses shown by said Joint Appendix to have testified at the trial of said cause were first duly sworn and, having been sworn, testified as said Joint Appendix shows.

(e) That wherever in said Joint Appendix any exhibit identified as one of the documents authenticated in the Stipulation of Facts (referred to in paragraph 1 above) is set forth in full, it is a true copy of the document so authenticated.

(f) That wherever in said Joint Appendix any exhibit identified as one of the documents authenticated in said Stipulation of Facts is partially set forth, the portions so set forth are correctly stated,

and the portions omitted from the Joint Appendix were omitted as not material.

3. A Transcript of Record and a Supplemental Transcript of Record in the Supreme Court of the United States in the case of Land, et al. v. Dollar, et al., October Term, 1950, No. 552, are referred to in paragraph 10 of the Fifth Defense in the answer to the complaint filed herein by these defendants. Plaintiff is requested to admit that said transcripts truly state the proceedings occurring in said action of Dollar v. Land (Land v. Dollar on appeal) from and including November 17, 1950 to and including the filing of the record in the United States Supreme Court in February 1951.

4. That Exhibit 1 attached to the answer of these defendants is a true copy of the "Order on Mandate Modifying Final Judgment" entered in the District Court of the United States for the District of Columbia in said action No. 31468 on March 16, 1948.

5. That the following allegations of the Fifth Defense of the Answer to the complaint filed herein by defendants are true:

- | | |
|-------------------|-------------------|
| (a) Paragraph 3. | (g) Paragraph 12. |
| (b) Paragraph 4. | (h) Paragraph 13. |
| (c) Paragraph 5. | (i) Paragraph 14. |
| (d) Paragraph 6. | (j) Paragraph 15. |
| (e) Paragraph 10. | (k) Paragraph 16. |
| (f) Paragraph 11. | (l) Paragraph 17. |

6. That the following allegations of the Eighth Defense of said answer are true:

- (a) Paragraph 2.

(b) Paragraph 3.

7. That the allegations of paragraph 2 of the Tenth Defense of said answer are true.

Dated: May 14, 1951.

/s/ HERMAN PHLEGER,
/s/ GREGORY A. HARRISON,
/s/ MOSES LASKY,
/s/ ALVIN J. ROCKWELL,
/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for defendants, R.
Stanley Dollar, et al.

Acknowledgment of Service attached.

[Endorsed]: Filed May 15, 1951.

[Title of District Court and Cause No. 30407.]

STATEMENT IN REPLY TO REQUEST FOR
ADMISSIONS OF FACT

The request of defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber for admissions of fact was served on Philip H. Angell, Special Assistant to the Attorney General, at his office in San Francisco at 2 p.m. May 15, 1951 and provides for admissions to be made within ten days, i.e., May 25. The request for admissions deals wholly with proceedings in the case of R. Stanley Dollar, et al. v. Emory S. Land, et al., Civil Action No. 31468 in the United States

District Court for the District of Columbia. Mr. Angell had no connection whatever with that action, did not act as counsel for any party therein, and has no knowledge of his own of any of the matters which are the subject of the request for admissions of fact.

By Request Number 1 plaintiff is requested to admit that each and every matter stipulated in a certain stipulation of facts filed in the case of *R. Stanley Dollar v. Emory S. Land*, No. 31468 in the United States District Court for the District of Columbia to be a fact, is a fact. Such stipulation is 137 pages in length and refers to several hundred exhibits. That stipulation was prepared on behalf of the defendants in that action by Mr. Melvin Siegel, who was then a Special Assistant to the Attorney General but who is now in the private practice of law in Minneapolis, Minnesota. Mr. Siegel has no connection whatever with either the present action or the litigation in *Dollar v. Land*.

That stipulation was also signed on behalf of the defendants by Mr. H. Graham Morison, who was then Acting Assistant Attorney General in charge of the Claims Division, Department of Justice, and who is now Assistant Attorney General in charge of the Anti-trust Division, Department of Justice. Mr. Morison did not, however, participate in the preparation of the stipulation and signed it in reliance upon Mr. Siegel as the counsel responsible for preparation of the stipulation. Consequently, Mr. Morison does not have knowledge of his own as to the

correctness or incorrectness of the facts alleged in said stipulation and said exhibits.

Furthermore, the developments in that litigation since the execution of that stipulation may, upon thorough reexamination of the stipulation, indicate the necessity for amendment or qualification of some statements made in the stipulation.

The only counsel for the United States who has any familiarity with the subject matter of Request Number 1 is Donald B. MacGuineas, attorney, Department of Justice. On May 15, 1951 Mr. MacGuineas was in San Francisco and was required to remain there through May 18, 1951 for the purpose of representing the United States in the argument of a motion before the Court of Appeals for the Ninth Circuit in an appeal from a preliminary injunction entered by this Court in this action (*Dollar v. United States*, Appeal No. 12,917).

The Dollar defendants did not serve with their request for admissions of fact a copy of the stipulation of facts which is the subject of Request Number 1, or copies of the exhibits there referred to. Upon request by Mr. Angell to counsel for the Dollar defendants, a copy of such stipulation of facts (but not copies of the exhibits there referred to) was delivered to him late in the afternoon of May 16.

Mr. MacGuineas, being fully occupied in preparing for the motion in the Court of Appeals, which was called for argument on the morning of May 18, was unable to do any work on the preparation of this statement in response to the request for admis-

sions of fact until his return to his office in Washington, D. C. on the morning of May 21.

Mr. MacGuineas, although he attended the trial of the action of Dollar v. Land in the United States District Court for the District of Columbia in an advisory capacity, did not act as leading counsel for the defendants in that trial. He had nothing to do with the preparation of said stipulation of facts or the exhibits to which it refers, and he has no familiarity with said stipulation or exhibits except such as was derived from the offer in evidence of parts of said stipulation and certain of said exhibits at said trial in the District Court for the District of Columbia. Neither Mr. MacGuineas nor any other of the counsel for plaintiff in this case has at the present time knowledge of his own of the correctness or incorrectness of the facts alleged in said stipulation and said exhibits.

On May 21 Mr. Robert Adams, an associate of Mr. Angell's, explained to Mr. Moses Lasky, one of counsel for the Dollar defendants, the circumstances and shortness of time which make it impossible for Mr. MacGuineas to prepare a complete answer to the request for admissions of fact and requested counsel for the Dollar defendants to agree to an extension of time to answer the request for admissions. On May 22 Mr. Lasky, counsel for the Dollar defendants, informed Mr. Adams that he would not agree to any extension of time whatever.

In order for this statement to be sent by air mail from Washington, D. C. to San Francisco so as to

arrive there on May 25, it must be mailed from Washington, D. C. not later than May 23.

A great number of the statements contained in said stipulation and the exhibits there referred to concern alleged facts, the correctness or incorrectness of which may not be determined from any records known to be in the files of the United States; for example, many of the exhibits referred to in said stipulation purport to be copies of minutes of meetings of various private corporations, including defendants Dollar Steamship Line, The Robert Dollar Co., and American President Lines, Ltd.

It is thought that the correctness or incorrectness of certain of the facts and exhibits referred to in said stipulation may be determined by an examination of records believed to be in the Government's files, but no counsel for plaintiff has knowledge of such Government records at this time, and obviously the time required to respond to the request for admissions of fact is so short that it will be physically impossible to locate such records as there may be and make an examination of them in order to answer fully the request for admissions of fact.

Accordingly, this statement answers the request for admissions of fact as fully as can be done on the basis of the present knowledge and information of counsel for the United States. As to matters not herein specifically denied or admitted, plaintiff cannot, for the reasons set forth above, truthfully admit or deny those matters at this time.

Counsel for the United States will, however, un-

dertake to proceed as rapidly as possible to make the necessary examination of all known Government records and documents in order to submit as soon as possible a supplementary statement as to whether plaintiff admits or denies the requests for admissions of fact which are not admitted or denied in this statement.

The United States reserves all rights to object to the admissibility in this action, whether on grounds of relevancy or otherwise, of any of the statements admitted herein.

1. For the reasons hereinabove stated plaintiff cannot at this time truthfully admit or deny categorically the matters contained in Request Number 1. If plaintiff is to be required to do so on the basis of its present knowledge, it denies them for lack of knowledge and information sufficient to form a belief.

2(a). Plaintiff admits Request Number 2(a) except as follows: It was Melvin H. Siegel, then Special Assistant to the Attorney General, and H. Graham Morison, then Assistant Attorney General in charge of the Claims Division, Department of Justice, who, acting as counsel for Emory S. Land, et al., appellees in Appeal No. 10299 in the United States Court of Appeals for the District of Columbia Circuit, agreed that the joint appendix (Exhibit 2 to request for admissions of fact) was the joint appendix to the brief of the parties on said appeal.

2(b). Plaintiff admits Request Number 2(b).

2(c). Plaintiff admits Request Number 2(c).

2(d). Plaintiff admits Request Number 2(d).

2(e). For the reasons hereinabove stated plaintiff cannot at this time truthfully admit or deny categorically the matters contained in Request Number 2(e). If plaintiff is to be required to do so on the basis of its present knowledge, it denies them for lack of knowledge and information sufficient to form a belief.

2(f). As to Request Number 2(f) plaintiff admits that wherever in said joint appendix any exhibit identified as one of the documents authenticated in said Stipulation of Facts is partially set forth, the portions so set forth constitute true copies of the copies of said documents referred to in said Stipulation of Facts. Except for that admission, however, for the reasons hereinabove stated, plaintiff cannot at this time truthfully admit or deny categorically the matters contained in Request Number 2(f). If plaintiff is to be required to do so on the basis of its present knowledge, it denies them for lack of knowledge and information sufficient to form a belief.

3. Plaintiff admits Request Number 3.

4. Plaintiff admits Request Number 4.

5(a). Plaintiff admits Request Number 5(a).

5(b). Plaintiff admits Request Number 5(b).

5(c). Plaintiff admits Request Number 5(c) with the following exception: Counsel for plaintiff have

no knowledge as to whether or not "The Robert Dollar Co. had in the meanwhile succeeded to all rights, title and interest of The J. Harold Dollar Estates Company" and therefore, for the reasons hereinabove stated, plaintiff cannot at this time truthfully admit or deny categorically the matters contained in said allegation in Request Number 5(c). If plaintiff is to be required to do so on the basis of its present knowledge, it denies said allegation for lack of knowledge and information sufficient to form a belief. Plaintiff denies the sentence on lines 19 through 24 of page 12 of the answer of the Dollar defendants, and states that the true facts with respect to said allegation are as follows: On February 4, 1948, after extended negotiations, the attorneys for the plaintiffs therein and an Acting Assistant Attorney General and a Special Assistant to the Attorney General who, under authority of the Attorney General of the United States were acting as counsel for defendants Land, et al., executed and filed on behalf of said defendants a "Stipulation of Facts".

5(d). Plaintiff admits Request Number 5(d) except as qualified as follows: (1) The judgment of the District Court referred to in Request Number 5(d) was rendered on March 31, 1949 rather than on May 31, 1949; (2) the Court of Appeals for the District of Columbia Circuit in its decision and judgment of July 17, 1950, did not order "judgment in favor of plaintiffs and against defendants for the recovery of possession of the said shares". Said

opinion and judgment of said Court of Appeals reversed the judgment of the District Court and remanded the cause for entry of judgment in accordance with said opinion of said Court of Appeals; (3) the joint appendix referred to in Request Number 5(d) was prepared and filed by mutual agreement of the attorneys for the plaintiffs and appellants therein and by a Special Assistant to the Attorney General who was acting, under authority of the Attorney General, as counsel for Land, et al., appellees in said appeal.

5(e). Plaintiff admits Request Number 5(e) except as qualified as follows: Before the entry of said judgment, Newell A. Clapp, Acting Assistant Attorney General, Edward H. Hickey and Donald B. MacGuineas, attorneys, Department of Justice, acting as counsel for Land, et al., the defendants in said action, and for Charles Sawyer, Secretary of Commerce, appearing specially and without submitting himself to the jurisdiction of the District Court for the District of Columbia, opposed the entry of judgment in favor of plaintiffs therein and sought entry of a judgment of dismissal. On December 12, 1950 the same attorneys, acting as counsel for the United States, appearing specially, and as counsel for Charles Sawyer, Secretary of Commerce, appearing specially, caused to be filed motions by the United States and by Charles Sawyer, Secretary of Commerce, to set aside and vacate the judgment entered by said District Court on December 11, 1950. Said motions were denied by said District Court. On December 15, 1950 the same attor-

neys, acting as counsel for the United States, appearing specially, for Charles Sawyer, Secretary of Commerce, appearing specially, and for the defendants Land, et al., caused to be filed in said District Court notices of appeal to the Court of Appeals for the District of Columbia Circuit.

5(f). Plaintiff admits Request Number 5(f).

5(g). Plaintiff admits Request Number 5(g) except that it denies that Exhibit 2 attached to the request for admissions of fact is a true copy of an order entered by said District Court on March 16, 1951.

5(h). Plaintiff denies Request Number 5(h) except as follows: On March 16, 1951 said Newell A. Clapp and Edward H. Hickey, acting as counsel for the defendants Land, et al., and for Charles Sawyer, Secretary of Commerce, appearing specially, caused to be filed in said District Court for the District of Columbia notices of appeal to the Court of Appeals for the District of Columbia Circuit from the order on mandate modifying judgment dated March 16, 1951 and the order of the court dated March 16, 1951, entered pursuant to the order on mandate modifying final judgment dated March 16, 1951. On April 4, 1951 upon motion of the plaintiffs and appellees in said case to dismiss the appeals as frivolous, each of the appeals was dismissed.

5(i). Plaintiff denies Request Number 5(i) except as follows: At all times after the decision of the United States Supreme Court on April 7, 1947

attorneys and officials of the Department of Justice, acting pursuant to authorization by the Attorney General, have acted throughout as counsel for the defendants Land, et al., as counsel for Charles Sawyer, Secretary of Commerce, appearing specially (but only in the specific respects in which papers were filed in said litigation in the name of Charles Sawyer, Secretary of Commerce), and for the United States, appearing specially (but only in the specific respects in which papers were filed in said litigation in the name of the United States).

5(j). Plaintiff denies Request Number 5(j) except as follows: Throughout said litigation in the case of Dollar v. Land attorneys in the Department of Justice acted as counsel for the defendants Land, et al. In signing papers filed in said litigation said attorneys added to their signatures a statement of their official positions in the Department of Justice.

5(k). Plaintiff admits Request Number 5(k).

5(l). Plaintiff denies Request Number 5(l) except as follows: Attorneys in the Department of Justice, pursuant to authorization by the Attorney General, acted as counsel for the defendants Land, et al. and sought an adjudication that the agreement of March 15, 1938, and the transfers made pursuant thereto on or about October 26, 1938, were an outright transfer of title and ownership to the United States, not a pledge, and that the United States thereby became, was, and is, the owner of said shares.

6(a). Plaintiff denies Request Number 6(a) except as follows: On June 10, 1947 in Dollar v. Land counsel for the plaintiffs therein and Peyton Ford, Assistant Attorney General, acting as counsel for defendants Land, et al., entered into the stipulation and agreement referred to in Request Number 6(a).

6(b). Plaintiff admits Request Number 6(b).

7. Plaintiff admits Request Number 7 except that plaintiff does not admit the last sentence of paragraph 2 of the 10th defense in the answer filed by the Dollar defendants in this action. Plaintiff alleges that said sentence is a conclusion of law which plaintiff is not required to admit or deny, but if plaintiff is required to admit or deny said sentence, it denies it.

/s/ HOLMES BALDRIDGE,
Assistant Attorney General.

/s/ EDWARD H. HICKEY,
Attorney, Department of Justice.

/s/ PHILIP H. ANGELL,
Special Assistant to the Attorney General.

/s/ DONALD B. MACGUINEAS,
Attorney, Department of Justice.
Attorneys for the United States.

Duly verified.

Certificate of Service attached.

[Endorsed]: Filed May 25, 1951.

[Title of District Court and Cause No. 30407.]

NOTICE OF MOTION TO DISMISS, FOR
JUDGMENT ON THE PLEADINGS AND
FOR SUMMARY JUDGMENT

To the plaintiff and to Newell A. Clapp, Esq., Acting Assistant Attorney General, Edward H. Hickey, Esq., and Donald B. MacGuineas, Esq., Attorneys, Department of Justice, and Philip H. Angell, Special Assistant to the Attorney General:

Please Take Notice, Hereby Given, that on Friday, the 1st day of June, 1951, at the hour of 2 o'clock p.m. or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, before the Honorable Edward P. Murphy, District Judge, in the Post Office Building in the City and County of San Francisco, defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber will move the court as follows:

I.

To Dismiss the action and for judgment on the pleadings dismissing said action, on the ground that the complaint fails to state a claim on which relief can be granted.

II.

To Grant a Summary Judgment for these defendants against the plaintiff on the ground that there is no genuine issue as to any material fact and that

the moving parties are entitled to a judgment as a matter of law, for each of the following reasons:

1. In the United States District Court for the District of Columbia in that certain action entitled "R. Stanley Dollar, et al. v. Emory S. Land, et al.," No. 31468, and in the United States Court of Appeals for the District of Columbia Circuit in the same action, it has been adjudged in favor of plaintiffs there, the moving defendants here, that when the shares of stock which are the subject matter of this action were transferred by these defendants and their predecessors in interest to the United States Maritime Commission or to the United States, in 1938, pursuant to the agreement of August 15, 1938, referred to in the complaint herein, said shares were transferred in pledge only, to secure a debt thereafter paid. Said adjudication is binding and conclusive on the plaintiff herein, and it is res judicata as against the plaintiff, because of the facts and reasons more fully alleged in the Fifth Defense and in the Sixth Defense in the answer of these defendants to the complaint herein.

2. The facts, on which there is no genuine issue of fact, establish that said transfers were by way of pledge only, to secure a debt, since paid off, as is set out in the Third Defense in the movants' answer to the complaint.

3. The issue in this case is the same as the issue in said Dollar v. Land, the facts material and relevant to said issue are the facts proved at the trial in said cause and deemed conclusive therein

by the Court of Appeals for the District of Columbia Circuit, and no others, and the decision of said Court of Appeals therein as to the nature of the agreement of August 15, 1938 and the transfers made thereunder is controlling here as a matter of stare decisis.

4. This Court is without jurisdiction to entertain this action wherein the plaintiff may assert a claim to the shares of stock herein involved, since the claim of the plaintiff could be presented only by way of intervention in said action No. 31468 in the United States District Court for the District of Columbia, as more fully stated in the Eighth Defense in the answer of these defendants.

5. The attorneys filing the complaint herein were and are without any authority in law to institute this action on behalf of the United States of America.

Each of the foregoing motions will be based on all the pleadings and papers on file herein, including this notice of motion and, without excluding such papers as are not here mentioned, the following:

(a) Deposition of Donald B. MacGuineas, one of the plaintiff's attorneys, taken in the case of *R. Stanley Dollar, et al., plaintiffs vs. Emory S. Land, et al., defendants*; In the Matter of Application of *R. Stanley Dollar, et al., petitioners, etc.*, No. 30428 in the files of this Court, which deposition was received in evidence in this Court on April 2, 1951

in the instant action at a hearing upon plaintiff's motion for a preliminary injunction consolidated with proceedings in said action No. 30428.

(b) All statements made by Donald B. MacGuineas herein in the proceedings on plaintiff's motion for a preliminary injunction, and particularly pages 10, 28, 29, 139, 141, 145, and 146 of the Reporter's Transcript of the proceedings of March 26 and 28, 1951.

Said motion will also be based on:

(a) All admissions made in response to these defendants' Request for Admissions of Fact, and

(b) Affidavit of Moses Lasky in support of this motion, which is served and filed herewith.

Dated: May 22, 1951.

/s/ HERMAN PHLEGER,
/s/ GREGORY A. HARRISON,
/s/ MOSES LASKY,
/s/ ALVIN J. ROCKWELL,
/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for defendants, R.
Stanley Dollar, et al.

Acknowledgment of Service attached.

[Endorsed]: Filed May 22, 1951.

[Title of District Court and Cause No. 30407.]

PROPOSED ORDER ON MOTIONS OF DEFENDANTS R. STANLEY DOLLAR, ET AL., TO DISMISS, FOR JUDGMENT ON THE PLEADINGS, AND FOR SUMMARY JUDGMENT

Pursuant to Rule 3(b)(2)(a) of the Rules of Practice of this Court, defendants R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber submit the following draft of the order which they propose on their motions to dismiss, for judgment on the pleadings, and for summary judgment:

Order and Summary Judgment

On the motion of the defendants, R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber, it appears to the Court that the agreement of August 15, 1938, copy of which is attached to the complaint herein, was a contract for transfer of the shares referred to in the complaint in pledge only, and that the transfers made thereunder were by way of pledge only, and the Court holds that no genuine issue of fact with respect thereto is presented and that plaintiff has failed to show that the issue tendered by it is other than feigned and spurious.

It further appears to the Court that the Attorney General of the United States and those acting under his supervision and direction in the Department

of Justice at all times handled the case of Dollar v. Land (Land v. Dollar on some of the appeals) referred to in the complaint herein, appearing for and in the name of defendants therein, preparing and trying the case, handling it on the several appeals and on proceedings in the United States Supreme Court, conducting the litigation at the expense of the Treasury of the United States, completely controlling that litigation in opposition to the plaintiffs therein (the moving defendants herein), seeking an adjudication that the said agreement and transfers were by way of outright transfer of ownership of the shares to the United States, doing so for the benefit of the United States as the real party in interest; and that the allegations of paragraphs 14 to 18, inclusive, of the Fifth Defense of the Answer of the moving defendants herein are true by undisputed evidence; and it further appears to the Court that consequently plaintiff herein is conclusively barred from asserting that said agreement of August 15, 1938 and the transfers of the shares made thereunder on or about October 26, 1938 were anything but a pledge to secure a debt since paid; and the Court holds that no genuine issue of fact with respect thereto is present.

And it further appears to the Court as a matter of law that the United States Maritime Commission was without legal authority to acquire outright ownership for the plaintiff of the shares in question.

And it further appears that the other grounds of the defendants' motions are well taken and that

no genuine issue of fact is presented as to any of them.

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That defendant Dollar Steamship Line is the owner of the 2,100,000 shares of the Class B stock of American President Lines, Ltd. referred to in the complaint and 2,075 shares of the Class A stock of American President Lines, Ltd., referred to therein; that defendant R. Stanley Dollar is the owner of 51,174 shares of the Class A stock referred to in the complaint; that defendant H. M. Lorber is the owner of 9,174 shares of the Class A stock referred to in the complaint; and that defendant The Robert Dollar Co. is the owner of 37,722 shares of the Class A stock referred to in the complaint.

2. That the complaint herein be and the same is hereby dismissed with prejudice.

Dated:, 1951.

.....,

United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed May 22, 1951.

[Title of District Court and Cause No. 30407.]

AFFIDAVIT OF MOSES LASKY IN SUP-
PORT OF MOTION FOR JUDGMENT ON
THE PLEADINGS AND SUMMARY
JUDGMENT

State of California,
City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and
says:

I am an attorney at law, a member of the bar
of this Court, and one of the attorneys for the de-
fendants R. Stanley Dollar, Dollar Steamship Line,
The Robert Dollar Co. and H. M. Lorber.

I.

The case of Dollar, et al. v. Land, et al., No.
31468 in the United States District Court for the
District of Columbia, was tried in that court begin-
ning April 21, 1948 and concluding with closing
arguments on May 11, 1948. It was tried on behalf
of defendants by Melvin H. Siegel, Esq., Special
Assistant to the Attorney General of the United
States, assisted by Donald B. MacGuineas and
Alvin O. West, both attorneys in the Department of
Justice. At all times during said trial I was asso-
ciated with Gregory A. Harrison, Esq., as one of
the attorneys for the plaintiffs in that action, and,
as such, was present in court during the entire trial.
I have in my possession a daily transcript of the
trial by the official court reporter, Thomas O'Neal,
certified by him, and all quotations below are from

that transcript. The whole of the transcript will be produced in court at the hearing of the motion for summary judgment, if the authenticity of any of the quotations is denied. Plaintiff already has a copy of the transcript. Furthermore, I personally heard all said remarks made. All underscoring in the quotations below has been added.

1. During said trial said Melvin H. Siegel stated that his real client was the United States of America, and that the United States of America was the real party in interest.

Thus on April 26, 1948, the following occurred:

“Mr. Siegel: If the Court please, the Government objects to the admission of this excerpt, without offering also the documents referred to, in the interest of completeness.

“I may say also at this point, Your Honor, that this may be an opportune occasion to clarify something that has arisen in the course of the offer of evidence. At the opening of the trial, Your Honor reminded us that of course this was not a case for a jury, and the Government has sought to limit its objections to the absolute minimum in order to avoid any interruptions and delays in the trial. But we would not wish to do so at the risk of prejudicing the Government by the receipt of incompetent evidence. And I would like, therefore, to state what I understand to be the situation with respect to this offer of evidence. [Tr. 380, 381.]

* * * * *

“That point becomes material because, if your

Honor please, without objection by the Government and based in part on a misunderstanding on my part of what Mr. Harrison had said in limiting his offer yesterday, I did not make any objection to the offer in evidence of certain exchanges of correspondence, it being my understanding that those letters were being offered merely to show, in accordance with the stipulation, that they were sent and received. [Tr. 382.] * * * * *

“Mr. Harrison: I must confess I am not clear as to what counsel believes my offers to be, or my offer to be. But at the outset I am confused by the statement of counsel that the Government was in this case. This was an action brought against individuals. Individuals are defendants here. The Government has not pleaded its title. The Government has not intervened, and therefore the Government is not, as I understand it, a party to this suit. [Tr. 382, 383.] * * * * *

“The Court: Let me ask you this question, Mr. Siegel: Is the Government in this picture?

“Mr. Siegel: If you Honor please, I did not intend to interject an extraneous issue, but I assume that our position will be as stated in the Supreme Court, and dependent upon the answer.

“The Court: I assumed that the individual members of the Maritime Commission hold this stock and refused to surrender it after the obligations for which the stock was collateral had been paid. If that is so, that is in the nature of tort, and they are individually responsible under the decisions. Isn't that right?

“Mr. Siegel: That is correct, Your Honor; and the reference to the position of the Government in this case has nothing to do with the admissibility of this particular evidence.

“I may say, Your Honor, in taking the view that the Government is the real party in interest, we have in truth allowed or waived, in effect, a limitation upon the evidence which would be perfectly permissible. If, for example, this action is in truth an action taken only against the individuals concerned, then clearly the evidence which is being offered as admissions could not be admissible against any of the defendants except those who were defendants who make the admissions, or their successors in interest; and succeeding members on the Commission would in no sense be successors in interest to their predecessors on the Commission.

“I have, however, made no such limitation and do not want to put any such technical limitation on the proof, though I could clearly on their theory of the action.” [Tr. 384-386.]

Thereafter on April 28, 1948, counsel repeated these statements with greater force. A colloquy occurred on demand by the plaintiffs in that action for production of a letter with respect to which Mr. Siegel asserted a claim of privilege. The following occurred:

“Mr. Siegel: If the Court please, we do have the letter in court, and I wish to express the Government’s position in respect to this document * * *

“* * * That would bring it within the lawyer-client privilege. [Tr. 702.]

“* * * unless directed to do so by the Court, we will not produce the letter. [Tr. 703.] * * * *”

“Mr. Siegel: If the Court please, the letter having been admitted, I would like to say, Your Honor, I will not object to the ruling of the Court. And I would like to say this, that when the request for documents was made by the plaintiffs, the Government leaned over backwards to produce anything that could possibly be conceived to be outside the rule of the lawyer-client privilege.

“The Court: Let me ask you this: Who is the client here?

“Mr. Siegel: The clients technically are certain individuals.

“The Court: Who is the client?

“Mr. Siegel: The United States of America, if the Court please, and if there is suggested a technical objection along the line raised by the plaintiffs, the answer would be that all communications of this character cannot be released without the consent by resolution of the United States Maritime Commission.” [Tr. 706.]

On April 30, 1948, the defense of the statute of limitations was discussed. The following occurred:

“The Court: Are you raising the statute of limitations question? Are you actually pleading the statute of limitations?”

“Mr. Siegel: If your Honor please, we have pleaded the defense, but we shall not only present a request as far as we can for a decision on the merits, but we have raised the point of the statute

of limitations as a method of emphasizing what we think to be the case, that this action was brought many years after transactions occurred in the light of changed circumstances brought about by the war and the increased value of the stock, but it will be our request insofar as it is our position to do so, that the Court render a decision on the merits.

“If that decision should be favorable to the Government, we would suggest the technical matter that the affirmative defenses are also sound. * * * * *

“The Court: Well, if you plead the statute of limitations, that is an affirmative defense and it ends the action if the case should be decided in your favor on that basis. However, if you invite my attention to the fact that you would rather have the case tried on the merits, I will treat that invitation as an indication upon the part of the Government that it is waiving the statute of limitations.

“Mr. Siegel: Your Honor, I cannot go that far. But I wish to say that the Government does not want to take the position in a case of this character of asking the Court to foreclose inquiry on the merits. Counsel has said that he specifically seeks to avoid the charge of bad faith or any issue which raises the integrity or motive of the officials of the Government. In our view, that is the fundamental issue in the case, and we would not wish to be in the position of appearing foreclosed from inquiry on the merits of such a question. [Tr. 1118, 1119.]
* * * * *

“Mr. Siegel: That is correct, and I do not wish

the Government to appear to be taking a technical defense to this case.

“I do not feel authorized to waive that defense, but we will rest our case on the merits of this case.

“However, your Honor, you may conclude possibly to rest the decision, should it be in favor of the Government on the merits, in the alternative ground that the statute also has applied, and that is a question which we will raise in subsequent argument.” [Tr. 1120.]

2. On numerous other occasions defense counsel spoke of the defense as the government. Some of these instances are as follows:

(a) Mr. Donald B. MacGuineas made the defendants’ Opening Statement on April 21st. He concluded his statement thus:

“I think in brief that states the Government’s position.” [Tr. 60.]

(b) In response to an inquiry of the court as to the probable length of the trial, the following occurred on the same day:

“Mr. Harrison: At the time the case was set for trial, may it Please the Court, we made an estimate at that time of two weeks to put in our case. We may be faster than that, or we may not, but that was the best estimate we could make then.

“Mr. MacGuineas: I think the Government will probably require an equivalent time.” [Tr. 86.]

(c) On the same day the following colloquy took place:

“The Court: Just let me ask you this question.

“As I understand what has gone on so far, the contract of August 15, 1938, was entered into because there was a large amount of indebtedness owed by the steamship company to the Government.

“Your position in the matter is that the stock that was pledged was actually pledged, or collateral put up, for the satisfaction of the indebtedness.

“The Government, on the other hand, claims that the stock was put up by virtue of the agreement because those who put it up, Mr. Dollar and the company, were joint and several obligors and that the reason why they put it up was because of the consideration if they put their stock up they, themselves, would be saved harmless, and their personal estates.

“Isn’t that your theory?

“Mr. MacGuineas: Precisely.” [Tr. 141, 142.]

(d) Mr. Siegel was not present in court on April 21, 1948, but on April 22nd the following occurred:

“Mr. MacGuineas: May it please the Court, may I introduce Mr. Melvin Siegel, who will also be counsel of record for the Government in this case?

“The Court: Yes.” [Tr. 160, 161.]

Thereafter the trial of the defense was principally conducted by Mr. Siegel.

(e) On April 23, 1948, during cross-examination of a witness by Mr. Siegel, the following occurred:

“The Court: So if the plan was never gone through with, why spend time on the plan?—because the only plan we are interested in is the plan that culminated in the agreement of August 15, 1938.

“Mr. Siegel: If that is the Court’s view, the Government would be very glad to terminate the examination of this witness at this time.

* * * * *

“Mr. Siegel: If it does become material, then it was then the purpose of the Government by cross examination, Your Honor, to show that this plan, far from being the perfect one which the plaintiffs claim for it, was in fact subject, as Mr. Radner would, I am sure, quite truthfully testify, to many various and serious financial defects;” [Tr. 322-323.]

(f) On April 26, 1948, the following occurred:

“Mr. Siegel: If the Court please, for the purpose of the record we wish to record our objection to the receipt of this evidence. We are content that the ruling on it be reserved to the close of the proof * * *

“But in conformity with the Government’s desire that all the facts be before the Court, we do not wish to suggest a final ruling at this time, but merely wish to preserve our record on the point.

* * * * *

“Mr. Siegel: The same objection, Your Honor. And to complete the Government’s record on this, the Government wishes now to move to strike the offer of proof * * *” [Tr. 425, 426.]

(g) Again on April 26, 1948:

“(The Maritime Commission’s minutes heretofore identified as Document No. 2-G-2, was accordingly marked and received in evidence, as Plaintiffs’ Exhibit No. 74.)

“Mr. Siegel. With respect to 2-G-2, the Government objects without further proof which the plaintiff can make to the minutes of the Commission, that this report was adopted by the Commission.” [Tr. 492.]

(h) On April 27, 1948 the following colloquy occurred:

“Mr. Harrison: We will ask that this document be marked as an exhibit for the plaintiffs.

“Mr. Siegel: (To Mr. Harrison) Will you furnish the Government a copy? Don't you have another copy? [Tr. 566.]

(i) Later in the same day the following occurred:

“Mr. Siegel: The Government will stipulate that according to our understanding of Maritime Commission procedure, it was appropriate for Admiral Wiley to record his views and vote as herein set forth.

“The Court: All right.” [Tr. 692.]

(j) On April 30th the following occurred:

“Mr. Siegel: I think I can assure the Court that what counsel states to be the insinuations in the report will not be the subject of proof by the Government in this case. * * *” [Tr. 1042.]

(k) On the same day:

“Mr. Siegel: Now, if Your Honor please, the Government's position is that the stock at that time had no value, that it could acquire a value if a substantial investment were made. It much preferred—much preferred—that the Dollar interests accept the proposal made in the April 28 or June 4 letters,

under which the Commission would acquire not title but a pledge, and would thereby acquire additional collateral; and, in addition, the Dollars would be sharing the risk with the Government.” [Tr. 1070.]

(1) On the same day:

“The Court: That is the Government’s position, is it not, that as a consequence of surrender of the stock, presuming for the moment there was authority in the Commission to accept it, as a matter of law generally, or as a creditor protecting its position, the consideration running to Mr. Dollar and to the Dollar Steamship Line was the release of their obligation as co-makers or guarantors of the ship mortgage notes held by the Commission?

“Mr. Siegel: That is part of the consideration, Your Honor.” [Tr. 1084.]

(m) On May 3rd the following occurred:

“Mr. Siegel: If Your Honor please, it is not in the transcript, and the Government believes it is entitled to set forth in the transcript, as plaintiffs have done, those parts which it believes to be material.” [Tr. 1150.]

(n) On May 4, 1948, the following occurred:

“Mr. Siegel: * * *

“I may say this is one of the most important documents the Government will offer, for the reason that it describes in vivid detail the nature of these negotiations.” [Tr. 1335.]

(o) On May 7th the following occurred:

“Mr. Siegel: The Government, if the Court please, would be perfectly happy if those allegations in the complaint and the evidenced adduced in sup-

port of it were stricken; but so long as it remains, I would like to answer it. It would take me no more than three or four questions, and five minutes.” [Tr. 1708.]

(p) On May 11th in closing argument Mr. Siegel said:

“But, if the Court please, if I should be wrong in that view, the Government should still prevail, for the reason that the first sentence of Section 207, dealing with the authority of the Commission to act in the manner of a private corporation, evidences the intention of Congress to give the Commission an autonomy enjoyed by public corporations generally.” [Tr. 1993.]

II.

On April 23, 1951, in open court, in the United States Court of Appeals for the District of Columbia Circuit, in the matter of Land, et al. v. Dollar, et al., and Charles Sawyer, Secretary of Commerce v. Dollar, et al., Nos. 10955 and 10956, the Attorney General of the United States personally delivered to the court and served on counsel for appellees a certain “Return of Charles Sawyer, Secretary of Commerce, Philip B. Fleming, Under Secretary of Commerce, Philip B. Perlman, Solicitor General, Peyton Ford, Deputy Attorney General, Newell A. Clapp, Edward H. Hickey, Donald B. MacGuineas, Philip N. Angell, and Paul D. Page, Jr. to Order to Show Cause in Civil and Criminal Contempt and Motion of these Respondents to Discharge said Order.”

The Order to Show Cause there referred to is the

order described in Exhibit 3 of the Answer of these defendants to the complaint in the instant case. Being one of the attorneys for appellees in the proceedings in said Court of Appeals, I was present at the time and personally know the facts here stated. Said Return was signed by the Attorney General and verified under oath by each of the parties on whose behalf it was made, other than Mr. Fleming. Attached to this affidavit is a true copy of the first two pages and most of the third page of said Return. Plaintiff's counsel herein have a copy of said Return since they were parties thereto and verified it. If the authenticity of the attached portions is questioned, a certified copy of the whole will be obtained and filed. The portions of said Return hereto attached are marked Exhibit 1 to this affidavit.

III.

In July 1947 Mr. Melvin H. Siegel, Special Assistant to the Attorney General, was in San Francisco and communicated with me to discuss the production of evidence in the said case of *Dollar v. Land*. Mr. Siegel and I agreed upon a mutual disclosure of the documentary evidence concerning and bearing upon the agreement of August 15, 1938 (referred to in the complaint herein) and the transfers of October 1938 made pursuant thereto, including documents postdating the transfers. Thereafter over a period of months both in San Francisco and in Washington Mr. Siegel and I negotiated together for a stipulation of facts. In the course of that negotiation we made available to one another vast

quantities of documents so that each might determine what could be relevant.

After this extensive search for documents, exploration of files, and mutual disclosure, I am prepared to say and do say that there are no documents relevant to the agreement of August 15, 1938 and said transfers that were not produced, in the hands of the Department of Justice at and before the trial of said case of Dollar v. Land, and introduced in evidence there.

Moreover, at the said trial the Department of Justice called as a witness the only person on its side of the transactions and negotiations who had conversed with any plaintiff or predecessor or representative thereof in the negotiation and consummation of the agreement of August 15, 1938, namely, Reginald S. Laughlin, Esq. Negotiations other than through Mr. Laughlin were carried on by written communication and all such communications were in the hands of the Department of Justice.

It is inconceivable that any evidence exists material to the interpretation of the agreement of August 15, 1938 and the transfers of shares made thereunder that was not placed in evidence in the trial of Dollar v. Land.

/s/ MOSES LASKY

Subscribed and sworn to before me this 21st day of May, 1951.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

In the United States Court of Appeals for the
District of Columbia Circuit

Enory S. Land, et al., Appellants,
vs.

No. 10,956

Charles Sawyer, Secretary of Commerce,
Appellant,
vs.

R. Stanley Dollar, et al., Appellees.

Return of Charles Sawyer, Secretary of Commerce, Philip B. Fleming, Under Secretary of Commerce, Philip B. Perlman, Solicitor General, Peyton Ford, Deputy Attorney General, Newell A. Clapp, Edward H. Hickey, Donald B. MacGuineas, Philip N. Angell, and Paul D. Page, Jr., to Order to Show Cause in Civil and Criminal Contempt and Motion of These Respondents to Discharge of Said Order.

Now come Charles Sawyer, Secretary of Commerce, Philip B. Fleming, Under Secretary of Commerce, Philip B. Perlman, Solicitor General, Peyton Ford, Deputy Attorney General, Newell A. Clapp, Edward H. Hickey, Donald B. MacGuineas, Philip H. Angell, and Paul D. Page, Jr., by their attor-

neys, Attorney General J. Howard McGrath and Assistant Attorney General Holmes Baldridge, and make the following return to the order issued by this Court on April 10, 1951, to show cause in civil and criminal contempt and move to discharge said order to show cause.

General Statement

Respondent Charles Sawyer is Secretary of Commerce, respondent Philip B. Fleming is Under Secretary of Commerce, and respondent Paul D. Page, Jr., is Solicitor, Maritime Administration, Department of Commerce. (These respondents are sometimes referred to as the Department of Commerce respondents.) Respondent Philip B. Perlman is Solicitor General, respondent Peyton Ford is Deputy Attorney General, and respondents Newell A. Clapp, Edward H. Hickey, Donald B. MacGuineas, and Philip N. Angell, are officials and attorneys in the Department of Justice. (These respondents are sometimes referred to as the Department of Justice respondents.)

All action taken by these respondents in connection with the charges set forth in the order to show cause issued by this Court, has been taken by them in the performance of their official duties and with the sole purpose of protecting what they conceive to be the interests of the United States with respect to the stock which is the subject matter of this litigation. All action taken by the De-

partment of Justice respondents has been taken under the direction and with the specific approval of the Attorney General.

In no respect have these respondents taken any action which they consider to be disrespectful of or in contempt of this Court or its decisions or mandates in this litigation. On the contrary, they have rendered full respect and obedience to the decisions and mandates of this Court as they have in good faith construed such decisions and mandates.

The Department of Justice respondents have been guided throughout by what they consider to be the holdings of the Supreme Court in *Land v. Dollar*, 330 U. S. 731, *United States v. Lee*, 106 U. S. 196, and *Carr v. United States*, 98 U. S. 433, to the effect that this litigation has been maintained against the former members of the Maritime Commission in their individual capacities, not as officers of the United States; that since the United States was not and could not be made a party to this litigation, it is in no way affected or bound by any judgment or decision therein; and that accordingly the United States is free to assert and exercise all rights and privileges as owner of the stock.

Until the denial of a petition for writ of certiorari in this case on March 12, 1951, the Department of Justice respondents considered themselves under the obligation to assert what they sincerely believe to be the immunity of the United States from a suit of this character, since only Congress, not the executive branch of the Government has power un-

der the Constitution to waive the Government's sovereign immunity from suit.

Upon the Supreme Court's denials of petitions for writs of certiorari in this case, the executive branch of the Government was necessarily obliged to adopt one of two courses: (1) To acquiesce in the judgments of the District Court entered following the mandates of this Court, even though the United States as a stranger to the litigations was not in any respect bound by such judgments, or (2) to take appropriate legal action to submit the claims of the United States to ownership of this stock to a court which could be given jurisdiction over such claims. With all due respect to this Court the Department of Justice respondents, in the exercise of their best legal judgment, have conscientiously been able to form no other conclusion than that the District Court of the District of Columbia was correct in its holding that the Dollars had transferred outright title to the stock to the United States acting through its agency, the United States Maritime Commission (*Dollar v. Land*, 82 F. Supp. 919), and that this Court had unfortunately been led into serious error when it reached the contrary conclusion that the Dollars had merely pledged the stock (*Dollar v. Land*, 184 F. (2d) 245). Being of this opinion, the Department of Justice respondents considered that the conscientious exercise of their public duty impelled them to recommend that the United States take all appropriate action to establish its rights as owner of the stock. That recom-

mendation was specifically approved by the Attorney General and by the President of the United States.

Acknowledgment of Service attached.

[Endorsed]: Filed May 22, 1951.

In the United States District Court for the Northern District of California, Southern Division

No. 30407

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., H. M. LORBER, AMERICAN PRESIDENT LINES, LTD., WELLS FARGO BANK AND UNION TRUST COMPANY, JOSEPH A. TOGNETTI, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

Defendants.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

This is an action to quiet title to certain shares of stock. On April 11, 1951, this Court, (Harris, D. J.), entered a preliminary injunction restraining the defendants, now in possession of the stock certificates pursuant to a decree of the District Court, District of Columbia (Dollar, et al. v. Land,

et al, Civil Action No. 31468), from exercising "effective possession". An appeal has been taken from the granting of that injunction. The Dollar defendants now move to dismiss the complaint, for judgment on the pleadings, and for summary judgment.

The complaint alleges that the United States is the owner of the stock having acquired absolute title pursuant to a written agreement dated August 15, 1938 entered into between defendants, and the United States Maritime Commission (then an agency of the United States Government). It further alleges that pursuant to that agreement the Dollar defendants endorsed in blank the stock certificates and delivered them to a representative of the United States Maritime Commission and that the true intent and legal result of the transfer of the certificates was to vest absolute title to the stock in the United States. The complaint refers to litigation in the District of Columbia courts in the action entitled *Dollar v. Land* (*supra*) and alleges that the United States is not bound by any proceedings or judgment in that action since it was not a party thereto.

The answer denies the Government's claims of ownership and sets up several affirmative defenses, principal among which are the claims that the transfer in issue constituted a pledge, that the Commission was without legal authority to acquire ownership of the stock, and that the findings in *Dollar v. Land* bind the plaintiff in this proceeding.

Some history of the controversy giving rise to this action may be found in the decision on the Government's motion for preliminary injunction (Harris, D. J., Nos. 30407, 30428, April 6, 1951). A chronological resume of the preceding five and a half years of litigation which dealt with this same subject matter may be found in the appendix to that opinion. There has been a thorough review of the facts in numerous prior opinions (see *Dollar v. Land*, 154 F. 2d 307; 330 U.S. 731; 82 F. Supp. 919; 184 F. 2d 245; 15 Fed. Rules Serv. 71.2 Case 1; CA, DC, Number 10875, Jan. 31, 1951; CA, DC, No. 10,955, April 11, 1951; CA, DC, No. 10955, May 18, 1951. We see no reason to repeat them here.

I. Has This Court Jurisdiction?

We have been met at the threshold of this hearing with the Government's objection that we cannot hear the motions during the pendency of the appeal from the preliminary injunction. The reason given is as follows: Prior to 1891 Federal law permitted appeals only from final decrees. By statute of that year appeals from certain interlocutory orders were allowed. This statute (old Title 28 U.S.C., Sec. 227) also contained a proviso that the proceedings in other respects should not be stayed. Upon revision of Title 28 in 1948 this section became Section 1292 and the proviso was dropped. Plaintiff argues that by reason of the deletion an opposite rule was established. Neither reason nor authority is evoked in support of this peculiar construction. It is suggested by the plaintiff that the provision may have been eliminated "perhaps by inadvertence, perhaps out

of policy reasons not fully set out in the legislative history * * *'. We cannot agree with the Government. In the light of sound and settled appellate theory the proviso in old Section 227 was mere surplusage. Judge Holtzoff, Special Consultant to the Revision Staff, states in 8 F.R.D. 343 at 344:

“The new Judicial Code is a masterpiece of legislative draftsmanship. The phraseology of practically every provision of the old Code has been drastically modified and revised in the direction of brevity, succinctness and simplicity. Redundant and repetitious provisions were deleted.”

The proviso added nothing to what would otherwise be law, and it was dropped in the revision for that reason.

The injunction pendente lite is a remedy collateral or incidental to trial on the merits. Whereas a final decree disposes of the whole case, and an appeal from it carries the whole case to the appellate court, an appeal from an interlocutory decree, where allowed by law, goes forward on its own record divorced from the merits. The trial court retains power to proceed to a final hearing as to all matters not directly involved in the incidental appeal. We cannot believe that if Congress intended the drastic modification urged by the Government some comment would not have been noted in the Reviser's Notes. But there is none (see Title 28 USC Sec. 1292).

William W. Barron, Chief Reviser, states (8 FRD 439 at 445):

“The usual rules of statutory construction with

one exception, apply to a statutory revision. That exception is important and its reasons should be readily recognized.

“Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.

“Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.

“Congress recognized this rule by including in its reports the complete Reviser’s Notes to each section in which are noted all instances where change is intended and the reasons therefor.”

Should we proceed in this instance, the Government further argues, we shall be placed in the position of considering issues now pending before the Appellate court, with resultant disorder and confusion. We disagree. The restraining order issued because, in Judge Harris’ opinion, grave and irreparable injury would result in its absence. That was a narrow determination sounding largely in discretion. The equally narrow question before the Court of Appeals is whether discretion was abused. Certain matters, such as the standing of the Government to sue, were implicitly dealt with in that preliminary proceeding, but only in so far as was necessary to that determination. No decision of the Appellate Court as to the power of the trial court

to issue the injunction or its propriety will impinge upon the questions before us.

II. Can This Case Be Decided on Motion for Judgment?

The Dollar defendants have moved to dismiss the complaint, for judgment on the pleadings and for summary judgment. Since, however, they rely upon matters *dehors* the pleadings we shall treat the treble-headed motion as one for summary judgment alone (Rule 12 [c] FRCP; Rule 12 [b] FRCP; *Suckow Borax Mines Consol. v. Borax Consolidated*, 185 F [2d] 196, 205 [CA9].)

While it is true that every simile limps, the motion for summary judgment is not unlike the unveiling of a statue. The motion requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact. In effect it argues that as a matter of law upon admitted or established facts the moving party is entitled to prevail or the adversary has no valid claim for relief (3 Barron and Holtzoff Sec. 1231). Should the adversary establish a substantial issue of fact, the court cannot try it on this motion. But where the only conflict is as to what legal conclusions should be drawn from the undisputed facts, or whether some rule of law precludes litigation, a summary judgment generally lies.

In this case defendants, by affidavit, have established that in the suit of *Dollar v. Land* both nominal parties, as well as the court, were constantly reminded of the fact that the suit was being

defended by the Government as real party in interest. Second, the decisions and record of Dollar v. Land in the Court of Appeals for the District of Columbia circuit have been brought to our judicial notice. This, we believe, is proper, for if the motion for summary judgment is based upon the ground that the issues have been determined in another action, the court should be free to consider the record in the other action. (See *United States v. Sinclair Refining Co.*, 126 F. 2d 827). Third, in a request for admissions defendants have annexed the stipulation of fact which was entered into between defendants and representatives of the Attorney General who controlled the defense in the prior case, and which, in substance, was the foundation for the former judgment. In the aforementioned affidavit, Mr. Lasky, a counsel for the Dollars in both proceedings asserts that in compiling the stipulation he and representatives of the Department of Justice exhaustively sifted every existing shred of evidence and that no additional fact of any substance could possibly be presented in this action.

In response to this showing the Government has done nothing. It has presented no opposing affidavits, no depositions, or counter admissions. Although in oral argument it hinted at some "other evidence", it failed to produce it in response to the motion. Obviously, the whole purpose of the summary judgment procedure would be defeated if a case could be forced to trial by merely contending that an issue exists, without any showing of evidence. Last, the Government has sought to evade

the defendants' attempt to bring the *Dollar v. Land* stipulation before us as a part of defendants' request for admissions. We are of the persuasion that the stipulation is properly before us by judicial notice. However that may be, the excuse is made that at least one of Government's counsel is unacquainted with the document, and it is so extensive that it is impossible to admit or deny the matters contained therein without extensive investigation. This strikes us as a bald-faced evasion. The Department of Justice has been living with that stipulation for years. The Government is not in the position of private counsel suddenly injected into complicated litigation. Such an advocate might well rely upon ignorance as an excuse, but all Government counsel had to do was wire the Department of Justice for confirmation. Significantly counsel did not petition the court for an extension of time in order to effect verification. We cannot help but feel that this was but a shallow attempt to keep facts from the court. Under Rule 36 if a party fails to answer satisfactorily a request for admission of the truth of facts or the genuineness of documents the matters contained in the request are deemed admitted. Such admissions, of course, may establish facts on a motion for summary judgment and result in the granting of such a judgment.

We thus may simply resolve the opposing positions as follows: The *Dollar* defendants have made an affirmative showing that the issues in this case are the same as those which were before the courts in the District of Columbia and have heretofore been

adjudicated. Defendants argue that plaintiff is concluded as to the issues there decided. Or, alternatively, if the Government is not estopped that the case is before us on the identical record upon which the Court of Appeals was compelled to reverse on the grounds that it contained no substantial evidence of absolute transfer. A fortiori, no genuine issue of fact is here presented and a summary judgment must be entered for defendants.

The Government, by inaction, has joined the issue on the former record and asserts that no former adjudication is binding on it, and the facts encompassed by that record are not susceptible to summary judgment.

At the same time plaintiff concedes that if the issues should somehow be *res judicata* or controlled by *stare decisis*, then the motion is appropriate.

III. Is the Judgment in *Dollar v. Land* Conclusive Against the Government as to the Issues There Decided?

The maxim that there must be an end to litigation is one of the most beneficial principles of our jurisprudence, (see 2 Freeman Judgments §625). It is a pragmatic, growing concept and not an archaic formula (see *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F. 2d, 82, 84, 60 S. Ct. 317, 67 S. Ct. 657). Due process requires that a person shall have an opportunity to be heard by a court of competent jurisdiction upon a matter which affects his interests. But the gauging of when, in legal contemplation, he has had a day in court is a

practical matter which searches reality and shuns form. As a general rule, only the parties and their privies are precluded from reopening controversies once adjudicated. The parties to an action are those who are adequately described as such in the record and judgment. "Privies", as classified in the Restatement of Judgments, (Sec. 83) includes three groups of persons: (1) Those who have a financial interest in the subject matter of the controversy and who control the action in whole or in part; (2) Those whose interests are represented in the action by a fiduciary or, as in class actions, by one who adequately represents their interests; and, (3) Those who subsequent to the beginning of the action are transferees from a party to the action, or from one of the other groups of privies, of a property interest which was the subject of the litigation or determination. The classic distinction between the operation of strict *res judicata* and what is commonly described as estoppel by judgment is found in Justice Fields opinion in *Cromwell v. County of Sac.*, 94 U.S. 351. (See also *Southern Pac. R. Co. v. United States*, 18 S. Ct. 18, 27; *Commissioner of Internal Revenue v. Sunnen*, 68 S. Ct. 715, 719; *United States v. Munsingwear, Inc.*, 71 S. Ct. 104). The rules operate on parties and privies in various ways. The plaintiff's cause of action is superceded by the judgment and by merger and bar he is precluded from again asserting the claim. If the subject matter of the dispute is an interest in property and the plaintiff prevails, the defendant is foreclosed from again claiming that he has a superior

interest, at least until he subsequently acquires some independent interest. A judgment has the further effect of estopping the parties from disputing the existence of a fact, and sometimes a matter of law, essential to the judgment, the existence of which was controverted and found to exist after active litigation. This preclusion has been variously termed collateral estoppel, estoppel by judgment, and estoppel by decision. (See Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1.) As stated above, it is encompassed within the broad doctrine of *res judicata* and its *raison d'être* is to put an end to expensive, repetitious litigation which burdens courts and litigants alike, where once the parties have had a full opportunity to present their cases.

The extent to which these rules apply to a privy depends upon the category to which he belongs. We are concerned only with the first group, and the reasons for the preclusion of those who have participated in an action are the same as those applicable to parties. Section 84 of the Restatement of Judgments contains a clear statement of the rule in this regard:

“A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.”

“Comment:

“a. Rationale. * * * A person is entitled only to one adjudication of a cause of action or of an issue where he has control of the proceedings; if under the circumstances to which this section applies a person has control over or participates in the control of the proceedings it is not unfair to him that the judgment or adjudication should determine the existence and the extent of interests which are dependent upon the determination of issues in the action leading to the judgment. * * *

“b. Scope of Rule * * * In the same way, where the one in control of the action or the defense has no interest in the precise subject matter of the suit but controls it because of his connection with the transaction out of which the suit arose, he is bound by and entitled to the benefits of the rules of res judicata upon issues which are actually litigated.”

In *Souffront v. Compagnie Des Sucreries*, 217 U.S. 475 at 487, the Supreme Court stated:

“* * * The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse

party, as he would be if he had been a party to the record.”

In *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F. 2d, 82, the court held that a judgment bound a person not a party who defended the suit on behalf of the record defendant, even though such participation was not open and avowed. The court said:

“* * * The general principle back of the rules of *res judicata* has received recent and clear statement by the Supreme Court. ‘Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.’

* * * A litigant is to have his day in court, but only one day in court, against another. The defendant here is in the position of asking for two days in court if he successfully masked his participation upon his first appearance. * * * An argument which seeks to establish a rule directly contrary to this broad principle must justify itself pretty clearly to be successfully maintained.”

This rule as part of the growing doctrine of *res judicata* has been invoked with great frequency during recent years. It is beyond question that if the immediate proceedings were between private parties plaintiff would be estopped from having what euphemistically is termed a “second day in court”—but which in fact might well become a second six years in court.

We thus are brought to the key question: Is the

rule of collateral estoppel any less applicable to the Government than it would be to a private litigant similarly situated?

The facts which limn the part played by the Government in *Dollar v. Land* are unequivocal. There are set out in the affidavit of Moses Lasky numerous passages from a certified copy of the reporter's transcript of the trial. These passages show that almost without exception the attorneys for the Department of Justice who handled the case nominally for the defendants referred to themselves as the "Government." Representative of the position taken and maintained throughout the entire course of the proceedings is the following colloquy:

"The Court: Let me ask you this: Who is the client here?"

"Mr. Siegel: The clients technically are certain individuals.

"The Court: Who is the client?

"Mr. Siegel: The United States of America, if the Court please * * *"

Counsel further stated that "the Government is the real party in interest."

Donald B. MacGuineas, an attorney in the Department of Justice, one of plaintiff's attorneys, and one of the attorneys for the defendants in *Dollar v. Land* testified in his deposition to his official capacity in the Department of Justice and to that of the other attorneys who appeared of record for defendants in *Dollar v. Land*. He testified that he acted as counsel in that case "in [his] capacity of attorney in the Department of Justice", that as such

he assisted another attorney in the Department in the trial, wrote the briefs and argued the cause orally in the Court of Appeals on the merits. As such he and his superior in the Department represented the defendants after the mandate went down, both in the trial court and again on the subsequent appeals, appearing also for the Secretary of Commerce and the United States. As such he prepared the first draft of a petition for certiorari in the United States Supreme Court, the final draft being prepared and filed by the Solicitor General of the United States. He testified that in all this activity he acted under official assignment from his superiors in the Department of Justice. Asked whether he "acted * * * as attorney in the Department of Justice of the United States", he replied "Entirely, I have never acted—I have never done anything in connection with that litigation except in my official capacity as an attorney in the Department of Justice pursuant to instructions from my superior officers." And he was compensated solely from the federal treasury.

The part that Government counsel played in the prior proceedings is thus indisputable. They controlled and continue to control every phase of the litigation for the avowed purpose of protecting the interest of the United States in possession of the stock. This claim of right in the Government is in harmony with the defense of Land that he asserted no personal right to the stock but was merely holding it for the government as agent of the government. Despite the Supreme Court's decision as to

jurisdiction there was a frank admission that the ultimate impact of *Dollar v. Land* would strike directly at the Government.

This same type of situation was adverted to in "Suits Against Government Officers and the Sovereign Immunity Doctrine" (59 Harv. L. R. 1060) in the following language:

"What is needed is a frank recognition of the frequently camouflaged fact that in practically every case against a government officer the interests of the government are so directly involved that it is actually the major defendant, * * * As a matter of fact, the government is not inarticulate in these cases. The defendant officials are represented by government counsel in the courts, and there is no basis for the assertion that the government's position is not as fully presented and defended as if the government were a party on the record.

"The courts are fond of saying that the government "cannot be tried behind its back," but although arresting, this proposition does not take account of the actual situation in these cases."

If we must find formal, as distinguished from de facto, authorization for the part played by the Attorney General, and the Department of Justice under his direction, we think it resides in Title 5 U.S.C.A. §§ 309 and 316. In the former section it is plainly set out that:

"(T)he Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is

interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Section 316 states:

"The Solicitor General, or any officer of the Department of Justice may be sent by the Attorney General to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

If, pursuant to this mandate, the Attorney General had formally intervened and become a party to the record, the Government's claim of title would have been there adjudicated. In the traditional sense of the term, the judgment would have been *res judicata* as to the Government. As there was no formal intervention, the judgment in *Dollar v. Land* was not *res judicata* as to any cause of action adhering to the Government. That is why the District Court for the District of Columbia was directed to modify its judgment from one which purported to quiet title against all the world, to one which dealt solely with right to possession.

But the fact that the Government, through the Attorney General, did not become a party of record and formally try its title does not mean that as to it the judgment was a nullity. Even though it was not a nominal party to the action the Government voluntarily assumed control of the defense in furtherance of an interest of its own. It enjoyed, in fact, all the rights of an actual party, such as the right to introduce evidence, examine, and cross-

examine witnesses, and to prosecute an appeal from the decision of the court. It is under these circumstances that the modern extensions of collateral estoppel come into operation. The Government, just as a private litigant is, as to the issues there adjudicated, entitled to one day in Court, and this it has had.

The day when all governmental action, however violative of the public and judicial conscience, was sacrosanct and immune is past. Traditionally governmental functions have receded in relative volume if not in importance, and in response to social demands the sovereign has shed its ermine robes for white collars * * * and some not so white. Sovereign immunity aside, when dealing with its subjects as tradesman or money lender there is no reason why the courts should accord to it inequitable advantage. As recently stated by Judge Peters of the First District Court of Appeals for the State of California (*Cruise v. City & County of San Francisco*, 101 C. A. (2d) 558, 565):

“Whether an estoppel exists against the government should be tested generally by the same rules as those applicable to private persons. The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one.”

Nor do we think that the doctrine of sovereign immunity imposes any barrier to this result. That Hobbesian anachronism has been properly the sub-

ject of much criticism in recent years. In *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, Mr. Chief Justice Vinson justified it as essential to the operation of government free from constant judicial harassment. In its essence it contemplates that the Government should not be required to respond in specie to the claims of individuals lest its sovereign functions be unduly handicapped. That is a far cry from the situation where the Government itself elects, through its legal representative, to interject itself into litigation between ostensibly private parties. The Government then becomes the actor. To coin a term, it becomes a "quasi-intervenor" seeking to benefit from control of the litigation. The sovereign thus yields its immunity upon the same rationale as if it formally intervened. The Government cannot both come in and stay out at the same time, and where collateral estoppel is concerned it is what one does, not what he calls his action, that controls. Plaintiff misconceives the scope of the doctrine when it protests that the action of the Attorney General was merely executive in nature. Land and the Commission made no claim to the stock other than that they were holding for the Government. There was no pretense that the Government, through the officer authorized to protect its interests, was defending other than its own possession as the admitted real party in interest. Throughout trial, appeals, petitions for hearing and modification this position was openly proclaimed. It would be difficult indeed to imagine a more conclusive instance of the Government han-

dling the laboring oar. And there is no pretense made that the Government is now seeking to relitigate the very same issues upon the identical record out of other than sheer disgruntlement over the failure of its prior efforts. This court cannot blink at the facts nor will it lend its processes to abuse. The Government having in fact made itself privy (in the enlarged sense of that term) to Land in the prior proceedings is concluded as to the issues adjudicated therein.

Opposed to this conclusion the Government arrays several early cases. The two which most pertinently state what appears to be a contrary rule are *Carr v. U. S.*, 98 U. S. 433 and *United States v. Lee*, 1 S. Ct. 257. In the latter case the decision in *Carr v. U. S.* was summarized as follows:

“That was a case in which the United States had filed a bill in the circuit court for the district of California to quiet title to the land on which a marine hospital had been built. To rebut the evidence of title offered by the plaintiffs, the defendant had relied on certain judgments rendered in the state courts, in which the unsuccessful parties set up title in the United States, under which they claimed. It appeared that the person who was district attorney of the United States had defended these actions, and the question under discussion was whether the United States was estopped by the proceedings so as to be unable to sustain the suit to quiet title. [The court then stated] the general doctrine that the United States cannot be sued without

her consent, and the further proposition that no such consent can be given except by congress, which is a sufficient reason why they cannot be concluded by an action to which they are not parties. * * * That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment in such case, was sufficient to decide that case, and was all that was decided.”

With all due deference to the court which decided Carr v. U. S., it is suggested that insofar as the opinion implies broadly that no intervention by Government legal representatives, unless specifically authorized by Congress, is binding on the United States, it is at odds with modern doctrines as to both estoppel and immunity. With reference to our discussion, *supra* (so to hold is to convert the shield of sovereign immunity into a sword. If on the other hand, the ultimate holding of the court was that title of the United States could not be adjudicated in such a proceeding, and that the prior judgment were not *res judicata* as to that cause of action, then the decision is fully reconcilable with ours.

There follows in the Lee case, at page 262, an explanation of the Carr doctrine which again, is not inconsistent with the law as applied in this case. The court there stated:

“(S)ince the United States cannot be made a defendant to a suit concerning its property, and no

judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr v. U. S.*, already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purpose to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the constitution."

A review of the *Carr* case shows that the State Court in a prior ejectment proceeding had gone into the question of title, and decided it against the defendant officers of the United States. It was this determination which, under prevailing California Law, the appellant sought to make conclusive against the government. Just as we stated in connection with *Dollar v. Land*, that cannot be done. The Government's claim of title could not be adjudi-

cated without it formally being a party of record. Its suit in this court to quiet title and for an injunction was proper. However, just as with "every person, natural or artificial," it was required to demonstrate that a substantial factual issue was present other than that decided in *Dollar v. Land*. For "even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." (*Southern Pac. R. Co. v. United States*, *supra*).

We believe as indicated that the Carr and Lee cases can be satisfactorily reconciled with this decision. However that may be, the law is a growing science. The latest expressions by the Supreme Court as to the principles here applied leave no doubt as to their pertinence to the government.

In *Drummond v. United States*, 324 U. S. 316 at 318, the Supreme Court stated:

"* * * If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States v. Candelaria*, 271 U.S. 432; 16 F. 2d 559, with *Logan v. United States* 58 F. 2d 697. But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy."

In the *Candelaria* case cited in the quotation the court said (at p. 444) in answering a certified question:

“But, as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney “so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit. *Souffront v. Compagnie des Sucreries*, 217 U. S. 475, 486; *Lovejoy v. Murray*, 3 Wall. 1, 18; *Clafin v. Fletcher*, 7 Fed. 851, 852; *Maloy v. Duden*, 86 Fed. 402, 404; *James v. Germania Iron Co.*, 107 Fed. 597, 613.”

It was the finding of the Court of Appeals for the District of Columbia that the transaction in issue constituted a pledge and not an absolute transfer.

In the proceeding before us the United States does not allege that its claim involves any new or different points of fact or law other than adjudicated by that tribunal.

Plaintiff is therefore estopped to relitigate them in this proceeding.

To hold otherwise would be to enlarge the rather grotesque spectacle of the government which has refused to submit to the rulings of its own courts, and to fix a pattern in future litigation of similar character which would not only make confusion

twice confounded, but would tend to destroy the law to which men have given their confidence and their honest respect.

The very object for which civil courts have been established is to secure the peace and repose of society by judicial determination.

The enforcement of their decisions is essential if the social order is to be maintained, for it must be obvious to the meanest apprehension that the aid of judicial tribunals would not be invoked for the vindication of personal or property rights, if as between the parties involved a final conclusion were not contemplated with regard to all matters properly in issue and actually determined.

No case within the purview of our examination has presented a more classic example, and a more urgent need for the application of the doctrine of collateral estoppel.

Accordingly we apply it here.

It is the decision of this court that title resides in the defendants and their motion for summary judgment is hereby granted.

Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That defendant Dollar Steamship Line is the owner of the 2,100,000 shares of the Class B stock of American President Lines, Ltd. referred to in the complaint and 2,075 shares of the Class A stock of American President Lines, Ltd., referred to

therein; that defendant R. Stanley Dollar is the owner of 51,174 shares of the Class A stock referred to in the complaint; that defendant H. M. Lorber is the owner of 9,174 shares of the Class A stock referred to in the complaint; and that defendant The Robert Dollar Co. is the owner of 37,722 shares of the Class A stock referred to in the complaint.

2. That the complaint herein be and the same is hereby dismissed with prejudice.

Dated: October 2, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed October 3, 1951.

[Title of District Court and Cause No. 30407.]

NOTICE OF APPEAL

Notice Is Hereby Given that United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order sustaining the motion of defendants, R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber for summary judgment and dismissing the complaint, which order was entered by the above entitled Court on October 3, 1951.

Dated: October 4, 1951.

HOLMES BALDRIDGE,
Assistant Attorney General

EDWARD H. HICKEY,
Attorney, Department of Justice

DONALD B. MacGUINEAS,
Attorney, Department of Justice

PHILIP H. ANGELL,
Special Assistant to the Attorney
General

/s/ By PHILIP H. ANGELL,
Attorneys for Plaintiff.

[Endorsed]: Filed October 4, 1951.

[Title of District Court and Cause No. 30407.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S APPLICATION FOR CONTINUANCE IN EFFECT OF PRELIMINARY INJUNCTION PENDING APPEAL

Hence plaintiff can now state that the matters stated in said stipulation to be facts are such, that the exhibits attached to said stipulation are true copies of the documents they purport to be, and that the Joint Appendix printed for the District of Columbia Court of Appeals in *Dollar v. Land* correctly sets forth the exhibits, or parts thereof, which it purports to do and that the portions of exhibits omitted from the Joint Appendix were then considered for the purpose of the appeal for which said Joint Appendix was prepared, to be not relevant.

As a result of the investigation, which is still being conducted, the Government is prepared to introduce a very considerable amount of new and relevant evidence at the trial of this action (not introduced in *Dollar v. Land*) as soon as the present judgment of this Court dismissing the complaint is reversed on appeal. A partial statement of the new evidence which plaintiff will introduce at the trial is the following:

(a) That contrary to the testimony of R. Stanley Dollar in the District of Columbia trial that he first learned on July 23, 1945 that American President Lines had discharged its 1938 debt to the

Maritime Commission, the 1943 annual report to the stockholders of the American President Lines, of whom R. Stanley Dollar was one, informed him that this debt had been entirely repaid.

(b) As new proof that the "pledge" theory of the Dollar defendants was first conceived about 1945, plaintiff will prove press publications in San Francisco and other cities of an offer by the Maritime Commission to sell this stock in 1943 and that the Dollar defendants made no protest of such proposed sale.

(c) That news articles in the San Francisco Press stating acquisition of ownership by the United States of the stock in controversy appeared on August 21, August 23, September 7, September 20, September 27, September 28, October 5, October 10, October 11 and October 28, 1938. Plaintiff will examine the Dollar defendants to determine whether or not they, as regular readers of the San Francisco papers, did not read these news articles, although they made no protest at the time refuting the statements that the Government was acquiring ownership of the stock.

(d) That the second account of the executors of the J. Harold Dollar estate, filed on January 31, 1939, listed the disputed stock as "sold and accounted for herein"; and that the final account of distribution of assets of that estate did not include this stock.

(e) That Mortimer Fleishhacker, who transferred part of the stock in 1938 to the Commission and who was a predecessor in interest of R. Stanley Dollar

as to certain shares of the stock, was allowed a capital loss he claimed only upon acceptance by the Bureau of Internal Revenue of his statement that he had surrendered all interest in the stock and a collaborating letter from the Maritime Commission that it received absolute title. That the same is true with respect to the tax return of the Dollar-Fleishhacker Trust.

(f) That Mortimer Fleishhacker in connection with his California State tax return submitted through his representative a statement to the tax authorities that "stock owned by the taxpayer was turned over to the Maritime Commission. The stock is still owned by the Commission."

(g) That the Robert Dollar Company in its California State return for 1938 claimed a loss from sale or exchange of its stock because it was "necessary to dispose of its investment in Dollar Steamship Lines stock".

(h) That Keith R. Ferguson, executor of the J. Harold Dollar Estate and counsel for the Dollar defendants at the closing of the stock transfer agreement, gave sworn testimony in the probate proceedings of that estate in Marin County, California, describing the disputed stock as that of "the steamship line we do not have any more".

(i) That H. Scott Dunham, who testified for the Dollars in the District Court of Columbia trial that a statement by him that the stock was "charged to income for the year 1938 upon the release to the United States Commission of the shares previously owned" really meant only that the stock was worth-

less, testified otherwise in the probate proceedings in Marin County, California on February 23, 1939 that as a result of that same transaction "at the present time the estate has no stock".

Respectfully submitted,

/s/ HOLMES BALDRIDGE,
Assistant Attorney General,

/s/ EDWARD H. HICKEY,
Attorney, Department of Justice

/s/ PHILIP H. ANGELL,
Special Assistant to the Attorney
General,

/s/ DONALD B. MacGUINEAS,
Attorneys, Department of Justice,
Attorneys for the United States.

[Endorsed]: Filed October 9, 1951.

[Title of District Court and Cause No. 30407.]

APPELLANT'S DESIGNATION OF CON- TENTS OF RECORD ON APPEAL

Appellant, United States of America, hereby designates all of the record, proceedings and evidence to be contained in the record on appeal from the order of the United States District Court for the Northern District of California, Southern Division, in the above entitled court proceedings, dated October 3, 1951, to the Court of Appeals of the United States in and for the Ninth Circuit. There are hereby designated all documents, affidavits and ex-

hibits, filed with, supplied to, or tendered to the above entitled court, whether or not the same were formally filed or admitted in evidence therein, including all pleadings, affidavits and documents filed with, or tendered to, the said District Court in connection with the hearing on October 10, 1951, of plaintiff's motion for continuance in effect of preliminary injunction pending appeal and the order of said District Court dated October 10, 1951 denying plaintiff's motion to continue in effect the preliminary injunction, denying the motion of amici curiae to file an application and granting the motion to strike the affidavit of E. L. Cochrane in support of said Motion to Continue said Preliminary Injunction in effect.

Dated: October 10, 1951.

/s/ HOLMES BALDRIDGE

Assistant Attorney General

/s/ EDWARD H. HICKEY

Attorney, Department of Justice

/s/ PHILIP H. ANGELL

Special Assistant to the Attorney
General

/s/ DONALD B. MacGUINEAS

Attorney, Department of Justice
Attorneys for the United States

[Endorsed]: Filed Oct. 10, 1951.

In the United States Court of Appeals
For the Ninth Circuit

No. 13130

UNITED STATES OF AMERICA,
Appellant,
vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP
LINE, THE ROBERT DOLLAR CO., and
H. M. LORBER,
Appellees.

STATEMENT BY APPELLANT OF POINTS
TO BE RELIED ON

Pursuant to Rule 19(6) of the Rules of this Court, Appellant, the United States, makes this statement of points on which it intends to rely in this appeal.

I. Appellant, the United States, is not bound or concluded by the judgments of the District of Columbia courts in the Dollar v. Land litigation by way of res judicata or "collateral estoppel", notwithstanding the fact that the Department of Justice represented the individual defendants in that litigation.

II. The District Court lacked jurisdiction or authority to consider or rule on appellees' motion for summary judgment, since issues raised by that motion were then pending before this Court in Appeal No. 12,917 in the same case.

III. The District Court (Murphy, J.) should have accepted as the law of the case the prior de-

terminations made in the same action by another judge of the same court (Harris, J.) that appellant is not concluded by the judgments in *Dollar v. Land* in the District of Columbia courts and is therefore entitled to litigate in this action the issue of ownership of the stock.

IV. The District Court should not have disposed of the action by summary judgment, since there was a genuine issue as to a material fact to be tried; i.e., whether the parties to the adjustment agreement of August 15, 1938, intended that absolute title to the stock in controversy be transferred, and appellees were not entitled to judgment as a matter of law.

V. The District Court erred in granting appellees' motion for summary judgment, in adjudicating that appellees are the owners of the stock, and in dismissing the complaint.

Respectfully submitted,

/s/ HOLMES BALDRIDGE

Assistant Attorney General

/s/ EDWARD H. HICKEY

Attorney, Department of Justice

/s/ PHILIP H. ANGELL

Special Assistant to the Attorney
General

/s/ DONALD B. MacGUINEAS

Attorney, Department of Justice
Attorneys for Appellant United
States

Certificate of Service attached.

[Endorsed]: Filed Oct. 24, 1951. Paul P. O'Brien
Clerk.

[Title of U. S. Court of Appeals and Cause, 13130.]

DESIGNATION BY APPELLEES R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO. AND H. M. LORBER OF ADDITIONAL PARTS OF THE RECORD DEEMED TO BE MATERIAL.

Appellees R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber hereby designate the following portions of the record which they deem material to the consideration of the appeal and which they request to be printed, in addition to portions designated by appellant.

1. The following portions of the transcript of proceedings in the District Court on March 26, 28 and 29, 1951:

(a) Pages 1 and 2.

(b) Page 10, line 10, beginning with the words "The case" and continuing through line 1 on page 11 (prefacing the whole passage with the words "Mr. MacGuineas: * * *").

(c) Page 28, line 19, to page 29, line 14.

(d) Page 92, line 21, to page 94, line 21.

(e) Page 144, line 12, to page 146, line 15 (prefacing the entire passage with the words "Mr. MacGuineas: * * *").

(f) Page 241, line 25, to page 244, line 3, ending with the word "prevail".

(g) Page 250, line 15, to page 251, line 16.

2. The following portions of the memorandum filed in the District Court on or about April 2, 1951, entitled "Summary of Defendants' Points on Motion for Preliminary Injunction and on Motion for Instructions":

(a) Page 1, to line 22.

(b) Page 4, line 18, to the end of page 5.

(c) Page 18, line 22, to the end of the page.

3. The following portions of the transcript in the District Court of proceedings of June 1 and June 4, 1951:

(a) Page 1.

(b) Page 3, lines 6 to 13.

(c) Page 12, line 23, to page 16, line 1.

(d) Page 30, line 11, to page 31, line 14 (prefacing the whole passage by the words "Mr. Lasky: * * *").

(e) Page 55, line 2, to page 56, line 6.

(f) Page 110, line 25, to page 111, line 19 (prefacing the whole passage by the words "Mr. Harrison: * * *").

(g) Page 122, line 10, to page 123, line 15.

4. The following portions of the "Memorandum

of Points and Authorities in Support of Plaintiff's Application for Continuance in Effect of Preliminary Injunction Pending Appeal" filed in the District Court on October 9, 1951.

(a) Page 1, through line 21.

(b) Page 11, line 18, through page 12, line 5.

(c) Page 16, line 5, to the end of the page.

5. Defendants' Exhibit 1 introduced in evidence on June 1, 1951 in support of motion for summary judgment, or preferably and in the alternative, note in the record that said exhibit is not printed because it is a certified copy of the document of which Exhibit 2 attached to the answer of the Dollar defendants is a copy.

6. In the event that the Court does not made an order permitting reference to the following without printing, then the following:

(a) Exhibits 1 and 2 to Request for Admissions of Fact.

(b) "Transcript of Record" and "Supplemental Transcript of Record" in the Supreme Court of the United States in the case of Land, et al. vs. Dollar, et al., October Term 1950, No. 552, referred to in paragraph 10 of the Fifth Defense of the Answer and received in evidence in this case in the District Court on April 4, 1951 in consolidated proceedings and 6".

7. This Designation..

Dated: November 5, 1951.

/s/ HERMAN PHLEGER
/s/ GREGORY A. HARRISON
/s/ MOSES LASKY
/s/ ALVIN J. ROCKWELL
/s/ BROBECK, PHLEGER &
HARRISON

Attorneys for appellees R. Stanley Dollar, Dollar
Steamship Line, The Robert Dollar Co. and
H. M. Lorber.

Acknowledgement of Service attached.

[Endorsed]: Filed Nov. 5, 1951. Paul P. O'Brien,
Clerk.

[Clerk's Note: Defendants' Exhibit No. 1, referred to in paragraph 5 of the foregoing designation is a certified copy of the document of which Exhibit No. 2 attached to the answer of the Dollar defendants is a copy, and is not reprinted here for that reason.]

No. 13130

IN THE
**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP
LINE, THE ROBERT DOLLAR CO., and
H. M. LORBER, et al.,

Appellees.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

PROCEEDINGS HAD IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the United States Court of Appeals
for the Ninth Circuit

No. 12917

R. STANLEY DOLLAR, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

No. 13130

UNITED STATES OF AMERICA,

Appellant,

vs.

R. STANLEY DOLLAR, et al.,

Appellees.

NOTICE OF MOTION OF APPELLANT
UNITED STATES OF AMERICA FOR IN-
JUNCTION TO PRESERVE THE STATUS
QUO PENDING APPEAL

To: Brobeck, Phleger & Harrison, Counsel for de-
fendants R. Stanley Dollar, Dollar Steamship
Line, The Robert Dollar Co. and H. M. Lorber.

Arthur B. Dunne, Counsel for defendants
American President Lines, Ltd., and Joseph A.
Tognetti.

Heller, Ehrmann, White & McAuliffe, coun-
sel for defendant Wells Fargo Bank and Union
Trust Company.

Chickering & Gregory, Counsel for defendant Anglo California National Bank of San Francisco.

Edward G. Chandler, Counsel for Ralph K. Davies, et al.

Please take notice that the undersigned will move the Court of Appeals for the Ninth Circuit on the 16th day of October, 1951, or as soon thereafter as they may be heard, for an injunction to preserve the status quo pending the disposition by said Court of Appeals of the pending appeal from the order of the United States District Court for the Northern District of California, Southern Division, entered October 3, 1951. A copy of said motion and memorandum of points and authorities in support thereof is attached hereto.

HOLMES BALDRIDGE,
Assistant Attorney General,

EDWARD H. HICKEY,
Attorney, Department of Justice

DONALD B. MacGUINEAS,
Attorney, Department of Justice

PHILIP H. ANGELL,
Special Assistant to the Attorney
General

/s/ By PHILIP H. ANGELL,
Attorneys for the Plaintiff.

Motion of Appellant for Injunction to Preserve the Status Quo Pending Appeal

Now comes the United States of America, appellant, by its attorneys, and moves this Court for an injunction to preserve the status quo pending the disposition by this Court of the pending appeal from the order of the United States District Court for the Northern District of California, Southern Division, entered October 3, 1951 sustaining the motion of the Dollar defendants¹ (appellants in No. 12,917 and appellees in No. 13,130) to dismiss the complaint, for judgment on the pleadings, and for summary judgment, and dismissing the complaint, on the grounds that the issuance of such an injunction is essential to prevent irreparable injury to the United States and to the public welfare, and to preserve the appellate jurisdiction of this Court.

On March 12, 1951 the United States filed in the court below its complaint to quiet title to certain shares of stock of defendants American President Lines, and to obtain an adjudication that the adverse claimants to the stock, the Dollar defendants, have no title thereto. The other defendants in that action are American President Lines and its stock transfer agents and registrar. On March 19, 1951 the United States filed in the court below a motion for preliminary injunction to preserve the status quo pending adjudication of the conflicting claims of title to the stock by restraining the Dollar de-

¹R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber.

endants from making demands on American President Lines and its transfer agents to be registered as owners of the stock, and restraining American President Lines from registering the stock in the name of the Dollar defendants, or otherwise recognizing them as owners. This motion was supported by the verified complaint and by affidavits showing that because of the vital role of American President Lines in connection with military operations in Korea, even a temporary disruption of its present efficient management would create irreparable injury to the public interest.

On March 20 American President Lines filed in the court below a motion for instructions pointing out that it was being subjected to conflicting claims of ownership of the stock by appellant and by appellees, and that it was entitled to court instructions before taking any steps with respect to ownership of the shares. On April 6, 1951, after a full hearing, the court below (Harris, J.) filed an opinion holding that the status quo should be preserved pending a final determination of the issues as to ownership of the stock; that irreparable injury to the Government would result if such preliminary injunction were not granted; and hence that the Government was entitled to a preliminary injunction to maintain the status quo. Judge Harris further held that the request of American President Lines for instructions was answered by the granting of the injunctive relief. *United States v. Dollar*, 97 F. Supp. 50 (D.C. N.D. Cal.).

On April 11 Judge Harris entered a preliminary injunction restraining the Dollar defendants from exercising or attempting to exercise any rights or privileges as owners of the stock certificates or the shares of stock in controversy, and from making any demands upon American President Lines and its transfer agents that the Dollar defendants be registered as owners of the shares, or that new certificates representing said shares be issued to them, and restraining the Dollar defendants from disposing of the stock certificates and the shares. The preliminary injunction also enjoined American President Lines and its transfer agents from issuing any new stock certificates to the Dollar defendants or from registering them as owners of the stock, or from any way recognizing the Dollar defendants as the lawful owners of the stock.

On April 20, 1951 the Dollar defendants appealed to this Court from the issuance of said preliminary injunction (Appeal No. 12,917), and the record on appeal is now lodged here. On May 4 the Dollar defendants filed in this Court their motion for a stay of the preliminary injunction granted by Judge Harris. On June 22, 1951 this Court denied that motion. *Dollar v. United States*, 190 F. 2d 547.

In May, District Judge Murphy succeeded District Judge Harris as the judge assigned to hear motions in the court below. On October 3, 1951 Judge Murphy granted a motion made by the Dollar defendants for summary judgment, and entered an order dismissing the complaint. On October 4 the

United States took an appeal here from that order of Judge Murphy.

On October 10 the United States made application to District Judge Carter for an order continuing in effect the preliminary injunction entered by Judge Harris, in order to prevent irreparable injury to the United States and to protect the appellate jurisdiction of this Court. The application was made in the alternative, either (a) to continue the injunction in effect pending disposition of the present appeal, or (b) to continue the injunction in effect for a period of five days in order to permit appellant to apply to this Court for an injunction pending appeal. On October 10, 1951 Judge Murphy, who heard that motion, refused to grant an injunction on either basis.

As shown by the memorandum submitted by appellant in support of this motion and the record in this Court on Appeal No. 12,917 and the appeal from Judge Murphy's order, particularly the two affidavits of E. L. Cochrane² and that of Donald B. MacGuineas (which record is incorporated as a part of this motion), irreparable injury will result to the United States and to the public interest unless this injunction pending appeal is granted; the granting of such injunction is essential in order to protect and preserve the appellate jurisdiction of this Court; and this appeal presents substantial

²A copy of the Cochrane affidavit of October 5 is filed herewith.

grounds for reversal of the order of the court below.

Respectfully submitted,

/s/ HOLMES BALDRIDGE,
Assistant Attorney General

/s/ EDWARD H. HICKEY,
Attorney, Department of Justice

/s/ PHILIP H. ANGELL,
Special Assistant to the Attorney
General

/s/ DONALD B. MacGUINEAS,
Attorney, Department of Justice
Attorneys for the United States

Certificate of Service attached.

[Endorsed]: Filed Oct. 10, 1951. Paul P. O'Brien,
Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Causes Nos. 12,917, 13,130.]

AFFIDAVIT OF E. L. COCHRANE, CHAIR-
MAN OF THE FEDERAL MARITIME
BOARD AND HEAD OF THE MARITIME
ADMINISTRATION, DEPARTMENT OF
COMMERCE, IN SUPPORT OF MOTION
OF APPELLANT FOR INJUNCTION TO
PRESERVE THE STATUS QUO PEND-
ING APPEAL.

I, E. L. Cochrane, being first duly sworn, do hereby depose and say:

1. I am the duly appointed and qualified Chairman of the Federal Maritime Board, and the head of the Maritime Administration, Department of Commerce.

2. The statements made in this affidavit are based upon my personal knowledge or upon information received by me in my official capacities aforesaid.

3. I make this affidavit in connection with the decision of Judge Edward P. Murphy of the United States District Court for the Northern District of California dismissing "with prejudice" the complaint filed by the United States to quiet title to stock of the American President Lines, Ltd. (known prior to its reorganization in 1938 as the Dollar Steamship Lines, Inc.) and setting aside a temporary injunction granted by Judge George B. Harris of the same court by which the Company

and its transfer agents were restrained from transferring the stock to the Dollar interests.

4. The Dollar interests have previously announced that when the stock was transferred to them they would take over control of the Company and supplant the present management. In fact they endeavored to do so at the annual meeting held March 19, 1951. This announcement was, according to newspaper reports, repeated immediately after **Judge Murphy's** decision (*New York Times*, October 4, 1951, page 59).

5. I am informed and believe that on June 4, 1951 the Supreme Court of the United States granted certiorari to review the March 16, 1951 order of the District Court for the District of Columbia requiring the Secretary of Commerce to endorse the stock certificates here involved and also the April 10, 1951 order of the Court of Appeals for the District of Columbia enjoining the prosecution of the Government's suit in California to prevent the transfer of the stock. The Supreme Court also stayed the Court of Appeals' order finding various Government officials in contempt until review of that order on petition for certiorari. In addition there is now pending before the Supreme Court an application to reconsider an order denying review to a decision of the Court of Appeals of the District of Columbia that the Dollars are the owners of the stock. Accordingly, I am informed that it is not unlikely that within the next few months the Supreme Court will hand down decisions that may well decide conclusively the controversy as to the

ownership of the stock and will at least afford material guidance as to the proper legal control of the Company for the immediate future.

6. Change of, or interference with, management at this time would disrupt operations of the Company at a most critical period in the national defense effort, particularly in the trans-Pacific trades and services in which the Company operates.

7. The United States Maritime Commission was created by an Act of Congress approved June 29, 1936 (49 Stat. 1985) to administer the Merchant Marine Act, 1936. The Act is expressly intended to foster and develop a United States Merchant Marine sufficient to carry on domestic water-borne commerce and a substantial portion of our water-borne export and import foreign commerce and capable of serving as a Naval and Military auxiliary in time of war or national emergency.

8. American President Lines, Ltd. under present management now is an integral and important unit in the American Merchant Marine, and as such an important factor in the national defense, commercial welfare and foreign policy of the United States of America. The company operates important cargo and passenger berth services around the world, trans-Pacific to Japan and the Philippine Islands, and between North Atlantic ports and ports in Malaya and Indonesia. All these services fulfill substantial roles in the normal commerce of the United States, and contribute vitally to the defense effort. The passenger services, constituting the only passenger services to the Orient, have supplemented

troop movements to Japan and Korea, and have participated in repatriation and other military lifts; the cargo services carry military cargo outward to the same destinations, and inbound from the Straits and Indonesia carry large quantities of rubber, tin and other strategic and critical materials essential to our national defense and economy. In addition to these regular operations, maintained with 22 vessels, the company has chartered 10 Victory ships exclusively for Defense Department trans-Pacific operations to Japan and Korea. Based on World War II experience, American President Lines, Ltd. has an organization capable of operating as General Agent approximately 100 Government vessels in full scale war service.

9. A report of the United States Maritime Commission (predecessor to the Federal Maritime Board) to the Congress of April 10, 1939, contains the following significant statements by the Commission with reference to the management of Dollar Steamship Lines, Inc., Ltd. at a time when the stock involved in the case of *R. Stanley Dollar et al v. Emory S. Land et al* was owned by the plaintiffs in said case:

“The past history of the Dollar operations made it obviously clear that the management was shockingly incompetent.

“The Dollar Line was notorious for its almost callous neglect of the conditions and accommodations of its crews’ quarters. Labor leaders implored the Commission to correct these conditions, stated that the labor situation on the Dollar ships could

not be controlled unless the Commission took remedial steps in connection with the crews' quarters.

"The resume of the affairs of the Dollar Line which follows this summary leads to certain logically inevitable conclusions. The problems of this service have been fundamental and chronic and involve difficulties recognized by the Government over a long period of time.

"It should be said at the outset that the problem is in no way attributable to a lack of business. Dollar Steamship Lines, Inc., Ltd., had an average gross operating revenue from its combination passenger and cargo vessels (exclusive of mail pay) of more than \$13,000,000 per annum during the eight years just past (1930-1937, inclusive). Almost \$5,000,000 per annum of this average sum was accounted for by passenger traffic.

"The real problem today is one which has harassed successive Federal agencies. The present Commission determined sometime ago that the principal issue must be squarely met and the basic cause of the Dollar debacle removed.

"A. First and foremost of these 'fundamental' causes has been unsatisfactory management—the failure of 'controlling interests' to discharge satisfactorily their functions and to meet their obligations as managers.

"These failures are evidenced by—

"(a) Excessive withdrawals over a period of years as (i) salaries to executive officers and directors, (ii) commissions, on company transactions, to executive officers,

“(b) Excessive management fees to affiliated companies,

“(c) Failure of ‘controlling interests’ to cooperate with the creditor interests in constructive measures in the interest of the company.

“(d) The maintenance by the ‘controlling interests’ of an attitude inimical to sound development and maintenance of essential American-flag service from the West Coast to the Orient.

“B. As the direct consequence of these failures of the ‘controlling interests’ properly to perform their duty, we find—

“(a) Ever increasing current trade debts,

“(b) Constantly accelerated sapping of cash and financial resources of the company,

“(c) The company’s inability to meet long term financial obligations to Government when due,

“(d) Failure to maintain adequate service from the West Coast to the Orient,

“C. An accentuated and aggravated necessity for immediate ship repairs due in a large measure to prolonged under maintenance.

“Other factors have also contributed to the present plight of the company, but the fact remains that the failure of management has been the principal factor reducing the company to its present regrettable condition.

“The company met its obligations to the Government until early 1931 when, on account of heavy payments on the construction loans, it requested an extension until 1933 of the ship sales notes falling due in 1931 and 1932. These extensions were granted. In 1932, the company suffered a net loss

of \$1,000,000 and almost equal losses continued during 1933. By the middle of 1933, the company's condition became critical and required corrective action by the Government.

“Before going into the steps which the Government took and the underlying reasons therefor, it is well to state why the affairs of the Dollar Line became so critical, not only because these conditions closely parallel the presently existing conditions which confront the Commission today, but also because the underlying causes for these conditions have been of a continuing nature and exist today.

“1. Causes of the Financial Difficulties.

“(a) It will be recalled that the total cost of the 502's and the 535's was \$9,500,000, which had been reduced by annual payments over the period to 1931. In 1929 the company added approximately another million dollars to its liabilities through the acquisition of the President Fillmore and President Johnson, and then in addition, added almost \$15,000,000 in Government and bank loans for the acquisition of the President Hoover and President Coolidge. Obviously the amortization charges on this enormously increased funded debt was a cost difficult to be borne unless drastic measures were adopted for conserving its working capital.

“(b) But no such measures were adopted. On the contrary every conceivable device was adopted to drain the earnings and the working capital from the company as rapidly as possible. For example, in 1932 while the operating company was losing over a million dollars, The Robert Dollar Company, its

managing agent, whose principal source of income was from a management contract, made a profit of over \$60,000 and paid executive salaries of \$135,000. The Robert Dollar Company was owned by substantially the same interests who owned the operating company. As another illustration, the Pacific Lighterage Corporation, another affiliated company, during the years 1928 and 1933, had profits of approximately \$1,500,000 and paid dividends of almost \$1,000,000 by reason of its 'company' connections.

"It is, of course, difficult at this time to determine precisely the grand total of sums so diverted but the following table which shows the total payments from the Dollar Line group and the American Mail Line group to the four principal owners admitted by the company to have been made from 1923 through the first six months of 1934 is very illuminating.

Year	R. Stanley Dollar	J. Harold Dollar	H. M. Lorber	H. Fleish- hacker
1923	\$26,748.24	\$30,480.00	\$32,236.80
1924	56,498.24	50,484.80	52,236.30
1925	98,656.54	30,482.80	32,236.80	\$626.88
1926	356,081.38	50,484.80	52,236.80	8,126.88
1927	304,448.28	52,323.68	53,195.84	30,966.24
1928	373,213.08	127,662.68	82,736.85	59,456.53
1929	419,002.75	187,747.08	119,061.36	95,462.10
1930	345,993.41	209,102.21	112,019.25	120,661.15
1931	216,447.70	110,896.55	69,874.92	21,987.82
1932	141,442.06	103,416.56	61,257.99	29,469.25
1933	116,739.58	85,662.50	50,000.00	11,000.00
1934 (6 mos.)	71,199.96	42,949.96	20,833.30
Total	\$2,526,501.22	\$1,081,693.62	\$737,926.21	\$377,756.85

"(c) So long as the volume of trade and freight

rates kept up to predepression levels and so long as the company did not have to meet heavy amortization and fixed charges, these huge withdrawals did not have immediate harmful effects, but with the lower volume of traffic and the lower freight rates which ensued it was almost immediately seen that the company, from the point of view of working capital, had been seriously weakened."

10. It can be readily appreciated that it would be a most serious handicap to the defense effort of the American Merchant Marine that so vital and important a unit come into the hands of management proven to be "shockingly incompetent" and unable and/or unwilling "to discharge satisfactorily their functions and meet their obligations as managers." It can also be appreciated that no managers of shipping operations should be given an opportunity to exploit their positions of trust by draining the earnings and capital of the company for enormous payments to affiliated companies and to themselves.

11. The Maritime Commission was, and the Federal Maritime Board and Maritime Administration, as its successors, are responsible for the administration of the subsidy provisions of said Act. Section 601(a) of the Merchant Marine Act of 1936, as amended, prohibits the approval of an application for subsidy unless the Federal Maritime Board determines, inter alia, that "the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations * * *" The present sub-

sidy contract between the Federal Maritime Board and American President Lines, Ltd. contains provision by which the Board may terminate the agreement if it is not satisfied with the "continued maintenance" of the "ability, experience, financial resources and other qualifications necessary to enable the Operator to conduct the proposed operations of the vessels covered by this agreement so as to meet competitive conditions and promote foreign commerce and in order further to give effect to undertakings given by the Operator to conduct its operations in the most economical and efficient manner." In connection with this contract, the Maritime Commission had approved the qualifications of the present management of the company as required by the Act, and as recently as April, 1951 the Federal Maritime Board (successor to the Maritime Commission) also approved its qualifications. In view of the explicit findings in the report of the Maritime Commission quoted above, it is apparent that the Federal Maritime Board would encounter serious difficulty in determining that management of the company by the Dollar interests would constitute "continued maintenance of the ability, experience, financial resources and other qualifications" necessary for its operations as required by the subsidy contract or in making the quasi-judicial findings required by the subsidy statute. Nevertheless, the Federal Maritime Board will conscientiously endeavor to perform this function upon such submission of the facts as the Dollar interests might make in the event of final court decision in their favor.

12. Although, as stated, the transfer of the management of the American President Lines, Ltd. to the Dollar interests at this critical moment of the American Merchant Marine would present most serious problems, even greater difficulties would arise if control were transferred to the Dollars and subsequently a decision of the United States Supreme Court or other tribunal should transfer it back again to its present control. Under such circumstances daily operations would be disrupted, company planning impeded, and key personnel of the present management lost to other shipping lines during the present period of intense marine activity. After such a dispersal of key personnel it would be obviously difficult to restore or replace them for American President Lines, Ltd. if the Dollar interests were eventually and authoritatively held not entitled to the stock in controversy. In short, from the point of view of the welfare of the American Merchant Marine, I must caution most urgently against shifting the control of this important line back and forth during the present national emergency.

13. Under the circumstances, it is my recommendation to the Court that the existing situation be maintained during the pendency of the appeal which the Government proposes to take from Judge Murphy's recent decision, at least until the lower courts receive guidance from the United States Su-

preme Court on the aspects of this controversy presently before that Court.

/s/ E. L. COCHRANE

District of Columbia, City of Washington, subscribed and sworn to before me this 5th day of October, 1951.

[Seal] RUTH HOLMES,
Notary Public in and for the District of Columbia.
My commission expires June 15, 1954.

Certificate of Service attached.

[Endorsed]: Filed Oct. 10, 1951. Paul P. O'Brien,
Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause No. 13,130.]

AFFIDAVIT OF E. H. HALL ON BEHALF OF
APPELLEES IN OPPOSITION TO MO-
TION FOR INJUNCTION PENDING AP-
PEAL FROM FINAL DECREE

State of California,
City and County of San Francisco—ss.

E. H. Hall, being first duly sworn, deposes and
says:

I am the Treasurer and Comptroller of The
Robert Dollar Co., one of the appellees, and I have
occupied those positions for many years, and have
the custody and control of the books of The Robert

Dollar Co. I have been in the shipping business for 48 years, beginning in 1903, and have served in practically every department. I have been in charge of an accounting department continuously since March 1915.

I.

Until the year 1924 there was no regular round-the-world steamship service operated by any company, domestic or foreign. The first regular round-the-world steamship service was started by the Dollars in the year 1924. At that time it was the universal expectation of the shipping industry that no such round-the-world service could be successful. But under the management of The Robert Dollar Co., it proved to be a successful operation. This round-the-world service was the first in the history of the world in which the date and hour of departure and arrival were regularly scheduled in the shipping industry. After 1930 the service was operated by American President Lines, Ltd. under the managing agency of The Robert Dollar Co. In the entire period of operations from 1924-1938, with the exception of the Maritime strike of 1936, no scheduled sailing was ever missed for any reason whatever, until late in 1937, although in 1931 and 1937 the Japanese invasion of the Chinese seaports disrupted movements to and from Chinese ports.

II.

Prior to January 1938 and from the inception of American President Lines, Ltd. The Robert Dollar Co. was its managing agent. Upon the granting in January 1938 of a temporary subsidy by the United

States Maritime Commission to Dollar Steamship Lines, Inc., Ltd. (now known as American President Lines, Ltd. and hereafter referred to in this affidavit as APL), the managing agency agreement of The Robert Dollar Co. for said APL was cancelled as of sailing after October 28, 1937.

APL's managing agency contract with The Robert Dollar Co. required the latter to pay the salaries of the managing officers and personnel. The executive officers of APL never received any salaries from it prior to 1938.

I do not know what commissions, if any, APL may have paid to any executive officer since the transfers to the United States Maritime Commission in 1938 of the shares of stock which are the subject matter of this litigation. But said APL paid no commissions of any kind to any officer prior thereto. The affidavit of Admiral E. L. Cochrane filed in this cause refers to alleged commissions. I personally know the facts concerning the subject referred to, and they are these:

In the years 1923 and 1925 ships were purchased by Dollar Steamship Line, a California corporation, one of the appellees here. That corporation is a different corporation from APL, which was incorporated in 1929. Commissions were voted by said appellee upon the purchase of said ships. I have seen and examined the corporate records of said appellee with respect to the commissions, and the payment of the commissions was approved at the time by a meeting of its stockholders.

III.

The affidavit of Admiral E. L. Cochrane filed in this cause quotes at page 5 a hearsay statement that when the Dollars controlled APL prior to 1938, "every conceivable device was adopted to drain the earnings and working capital from the company as rapidly as possible." This is false.

The table of alleged "withdrawals" appearing at the top of page 6 of Admiral Cochrane's affidavit has its source in a previous report of the Post Office Department, and it appears in a statement before that Department to which I was a signatory with respect to data concerning American Mail Line and Admiral Oriental Line. I was not a signatory to that statement on behalf of APL or appellee Dollar Steamship Line. The Robert Dollar Co. was not a signatory thereto at all. Consequently, I am familiar with that table from its origin. Some of the figures in the table as they appear in the report quoted by Admiral Cochrane were changed upward from the prior report and the changes are unwarranted. None of the sums appearing on this table are or were withdrawals from APL.

IV.

The Robert Dollar Co. has been in existence since 1903, acting as agent and manager to many ships and companies. It had offices and facilities throughout the world. For its services to these various ships and companies, it was remunerated on the customary world-wide basis of a flat percentage of earned gross revenues. This method of compensating agents and managers was the basis adopted by the United

States Shipping Board in 1917 and 1918 in the MO-4 Agreement system. This method of operating ships through managing agents and paying them a management fee was standard practice in the shipping business throughout the world until the adoption of the Merchant Marine Act of 1936, and it is still a practice followed in the American Merchant Marine particularly by the Military Sea Transportation Service of the United States Government.

By reason of the managing agency arrangement between The Robert Dollar Co. and APL, APL did not have to and did not maintain any managing or administrative departments. It had no managing or administrative payrolls to meet and did not have to maintain offices or facilities throughout the world.

For its services and facilities The Robert Dollar Co. was paid a fee of 10% of the gross operating revenues. No management fee was ever paid by APL to any company but The Robert Dollar Co. prior to the time the Maritime Commission took control. Out of the 10% fee The Robert Dollar Co. paid all expenses of management and administration, including payrolls, maintenances of offices and facilities in ports throughout the world.

A copy of the annual report for the year 1950 is part of the records of this Court in the case of *R. Stanley Dollar, et al. v. United States*, Docket No. 12917. According to that annual report, APL's administrative and general expenses for the year 1950 were \$6,366,601. This is the cost for the services of the kind, which formerly The Robert Dollar Co. performed. That report shows that the gross reve-

nues of APL for the year 1950 were \$48,936,339, plus \$198,867 for agency fees and commissions earned. To obtain the total gross revenue comparable to the figure that would have been subject to managing agency commissions under the prior arrangement, there must be added earned and collectible operating differential subsidy. The income statement in said annual report contains an item "Tentative Accrual of Operating Differential Subsidy (see Note 1)" in the amount of \$6,500,000. Note 1 states that this is an estimate which the company was not then in a position to verify or confirm. There after on June 21, 1951 Mr. Arthur B. Poole, Treasurer of APL, personally advised me that the amount of subsidy that the government had agreed was certainly payable for the years 1947 to 1950, inclusive, was \$5,500,000. Any other amounts would depend upon future events. Adding $\frac{1}{4}$ of this amount as income in the 1950 income statement brings the total gross revenue for that year to \$50,510,206.00.

The administrative and general expenses referred to above constitute somewhat more than $12\frac{1}{2}\%$ of this figure. This $12\frac{1}{2}\%$ is to be compared with the 10% paid by APL to The Robert Dollar Co. for the same service prior to 1938. In other words, the present administrative and general expense cost of APL is 25% greater than it would have been under a managing agency arrangement such as prevailed with The Robert Dollar Co. prior to 1938.

Under date of February 17, 1938, the United States Maritime Commission made a report to Congress entitled "Financial Readjustments in Dollar

Steamship Lines, Inc., Ltd. and Documents Executed in Connection Therewith etc." At page 19 it is reported thus:

"In view of the history leading up to the enactment of Sec. 805(d) of the Merchant Marine Act, 1936, which section makes it unlawful, without the consent of the Commission, for any recipient of a subsidy to employ any managing or operating agent, the Commission carefully scrutinized the services rendered by and the compensation paid to The Robert Dollar Company as managing agent for Dollar Steamship Lines, Inc., Ltd. * * *"

At page 157 of the same report to Congress, there appears a committee report dated January 20, 1938 to the Board of Directors of APL. The committee there states that it had made a study of the managing agency services performed by The Robert Dollar Co. for APL, that it "has had presented to it a summary of the earnings of The Robert Dollar Company for the 9½ years ending June 30, 1937, obtained from Ralph B. Butterfield, Auditor, United States Maritime Commission", and that it also had obtained from Mr. Butterfield additional information. The report then states that

"Upon giving consideration to the information thus obtained, and to other information available to it, your committee is unanimously of the opinion that the cost to The Robert Dollar Steamship Lines, services rendered by it to Dollar Steamship Lines, Inc., Ltd. as above described, was not less than the amounts of commission which would accrue to The

Robert Dollar Company therefor, by the terms of the aforesaid agreement of June 23, 1926",

that is, the agreement under which said managing agency services were being performed.

The committee rendering this report consisted of Arthur B. Poole, J. Hugh Jackson and D. T. Buckley.

Arthur B. Poole is now the Vice President and Treasurer of APL and a member of the Board of Directors and has been since January 1938. At pages 26 and 27 of said report to Congress of February 1938, the following appears concerning Messrs. Poole and Jackson:

"It also seemed to the Commission that in addition to there being a direct representative of the Commission on the Board of Directors [of APL], there should be at least one director representing the public interest * * *

"Consequently [in January 1938 at the request of the Commission] the Board of Directors was revamped to include * * * Mr. Arthur B. Poole, representing the Commission; and Mr. J. Hugh Jackson, representing the public.

* * *

"Mr. Poole * * * had previously been associated with Chairman Kennedy in a number of important corporate reorganizations. Mr. Jackson is presiding Dean of the Graduate School of Business of Stanford University and is Acting Comptroller. His election was approved by the Commission after

careful investigation, indicating his outstanding qualifications.

“Mr. Poole was also elected a Vice President of the company with very wide powers over its finances. On January 25, 1936, although this had not been required by the Commission, the other directors elected him Treasurer of the company in order further to clarify and extend his powers and duties.”

The third member of the committee reporting on the managing agency fees, as stated above, was D. T. Buckley. After the Commission took over the control of the company by reason of the stock transfers of October 1938, said D. T. Buckley continued in the service of APL until his retirement in 1946.

In the years while The Robert Dollar Co. acted as managing agent for APL it was also agent for other companies and was engaged in the lumber and other businesses. At page 19 of the February 1938 report to Congress it is stated that “The Robert Dollar Company engages in lumber and other operations distinct from the steamship business.”

The affidavit of Admiral Cochrane (p. 5) states that “In 1932 while the operating company was losing over a million dollars, The Robert Dollar Company, its managing agent, whose principal source of income was from a management contract, made a profit of over \$60,000 and paid executive salaries of \$135,000”. In fact, the principal source of income of The Robert Dollar Co. was not as there stated. While the greater portion of its gross in-

come was derived from that service, its net income in 1932 was derived in an equal amount from activities in no way connected with APL.

Furthermore, the figure of \$135,000 for executive salaries in 1932 is incorrect. The fact is that the executive department salaries, including those of clerks and stenographers, for The Robert Dollar Co. in 1932 was \$58,900. That figure is to be compared with APL's outlay in 1950 of \$175,578 for executive salaries excluding clerks and stenographers receiving less than \$5,000. The service performed by the executive department of The Robert Dollar Co. in 1932 included all the work presently performed by the executive department of APL and work for other activities as well. If the salary cost of the executive department of The Robert Dollar Co. in 1938 was excessive, then the present salary cost of APL is much more excessive.

After April 1934 and while it was managing agent for APL The Robert Dollar Co. paid no salaries to any of the individuals whose names appear at page 6 of Admiral Cochrane's affidavit.

Pacific Lighterage Corporation or Company, of which I was Treasurer for a period of 11 years, was a corporation engaged in the business of stevedoring, towing and barging. During the years from September 1927 to April 1937 it performed stevedoring services for APL. During the same period of time it performed stevedoring services for six other companies, including Blue Star Line (a British line) and Panama Pacific Line (a subsidiary of United States Lines). In the affidavit of Admiral

Cochrane referred to above there is a statement that the profits of Pacific Lighterage Company for the period 1928 to 1938 were 1½ million dollars. But only 20% to 25% of the revenue of Pacific Lighterage Company was received from APL.

In the year 1934 an investigator of the United States Shipping Board investigated the services performed by Pacific Lighterage Company for APL and American Mail Line and the charges made for the service. At that time I was Treasurer of American Mail Line and had ceased to be Treasurer of Pacific Lighterage Company only a short time before. The investigator told me that his investigation showed that Pacific Lighterage Company charged these two companies less for the services performed than other stevedoring companies would have charged, and showed me a written report to that effect which he stated he was submitting to the United States Shipping Board. At no time since that date have I heard it claimed by anyone that the amounts charged by Pacific Lighterage Company were unfair.

V.

The memorandum filed in support of appellant's motion seeks to make a comparison between the condition of APL at the time the Maritime Commission took over the management in 1938 and its present condition. That comparison is completely misleading.

The memorandum states that when the Commission took control in 1938, APL had a "cumulative earnings deficit" of over 17 million dollars, that

APL's net income after taxes in 1950 exceeded 3 million dollars, and that during the period of government management from 1938 to 1950 the company earned over 30 million dollars.

But the actual facts are these: The figure of 17 million dollars stated to be "cumulative earnings deficit" includes a charge of \$6,350,000 arbitrarily set up, after the Commission took over the management, as a reserve "to be available * * * to absorb losses which may be sustained upon disposition of capital assets and/or to bear charges for write down of capital assets".

It was so set up in the 1938 annual report, issued in 1939, and since 1943 has been called a "reserve for contingencies".

While two of the ships were thereafter sold for \$789,000 less than book value, and this amount was charged against the reserve, the other ships were sold at a profit of \$4,613,000 in excess of book value, as is stated in the 1950 annual report of the company. Consequently, \$5,561,000 of the reserve should not be included to build up the "cumulative earnings deficit". Similarly, while the profit of \$4,613,000 is carried in APL's statements as earned in the years after 1938, it actually represents a part of the 1938 values.

Thus APL's reports misrepresent the size of the deficit of the company at the time the Maritime Commission took over the management by \$6,000,000 and state as profits of government operation \$4,000,000 of pre-1938 asset values. The sum of the two produces a discrepancy of over 10 million dol-

lars between the actual condition of the company at the time of the change in management in 1938 and APL's present statements thereof.

Upon adjusting the figures to comport with truth and reality the deficit was not \$17,000,000 but \$7,000,000. Furthermore, the so-called "cumulative earnings deficit" of 17 million dollars contains in it the cost of effecting improvements and betterments required by the safety-at-sea requirements. These should not have been included in the deficit but should have been capitalized. The deficit would thus be reduced further.

A deficit of \$7,000,000 is small considering that it was the end result of 9 years of depression, two major maritime strikes, disruption of service at Oriental ports by war conditions, cutting off of mail pay in 1937, and failure to receive subsidies.

Moreover, most of this deficit occurred in 1938. The net loss of APL for the year 1938 was \$4,282,456.43. It was in this year that the service of the company was disrupted by difficulties in arriving at an agreement with the Maritime Commission. And after January 1938 APL's management was in large part dominated by the Maritime Commission and its financial affairs controlled by the Commission's appointee, Arthur B. Poole.

Similarly, the alleged profits of APL since 1938 and in 1950 must be restated in order to be correct. In the year 1950 APL sustained a loss after income charges but before subsidy of \$1,179,540, as may be determined from its 1950 annual report. As already stated in this affidavit, the subsidy agreed on

between APL and the government for the years 1947 to 1950, inclusive, is \$5,500,000. One quarter of this amount is to be assigned the year 1950, leaving an actual net income before income taxes for 1950 of \$195,460 and not \$5,320,460 before income taxes or \$3,181,278 after income taxes, as stated in the 1950 annual report.

The stated figure of \$30,159,000 of profit since the change of management in 1938 is also fallacious.

In the first place, this item includes \$4,613,000 of proceeds of ships in excess of the value carried on the books in 1938, as stated above.

In the second place, it fails to deduct a figure of \$1,356,000 representing payments of crew wage settlements, income taxes and interest thereon, war losses on equipment and other items, which were treated, instead, as reductions of the reserve originally set up against capital assets (as shown by the 1938 annual report and the quotation therefrom above) and not disclosed in the Income Statements.

In the third place, the alleged profit of 30 million dollars includes an item of \$19,700,000, as shown in the annual report for 1950, as "Tentative Accrual of Operating Differential Subsidy". As APL's Treasurer, Mr. Arthur B. Poole has told me, of this entire amount only \$5,500,000 is now certain. It is not possible to say whether any of the remaining \$14,200,000 will be collected, or if so how much. And it is true that if this \$14,200,000 should not be collected, the purported or "tentative" surplus would not be reduced in an equal amount because of resulting credits for recapture and income tax in amounts

not presently determinable from information in my possession.

In any event the profits for the 12 years, 1939-1950, are closer to \$10,000,000 than to \$30,000,000 or \$825,000 per year.

VI.

I have recently caused to be made and am still conducting an investigation of the books of APL, to which I have been given partial access as a representative of stockholders. This investigation shows that 62% of all senior personnel in the employ of APL, that is to say, all personnel receiving over \$5,000 per year as of December 31, 1950, are people who were in the employ of The Robert Dollar Co. or under its management at the time it was managing agent for APL, and they had been trained by The Robert Dollar Co. The flyleaf of the 1950 annual report lists ten top officers. Of these Messrs. Alexander, Danaher, Varcoe, Goodwin and Tognetti were in the employ of The Robert Dollar Co. or under its management prior to the time the Maritime Commission took over the control of APL and have remained in the employ of APL ever since.

VII.

The capital stock of APL consists of 2,386,243 shares of all classes outstanding, each having one vote. The shares involved in the present litigation total 2,200,145. Appellees and associates own 18,332 shares not in litigation. Another 13,061 shares are now in dispute between the United States and others as a result of the same transaction as that involved

in the present litigation. The remaining shares or minority stock total 154,705. Of this minority stock the present de facto APL management claims that 82,805 shares were voted for it at the annual election of the company in March 1951. This represents but 3½% of the voting control. I was present at said annual meeting. All but 4,562 shares were voted by proxy, and I know that some of those voting in person were against the management. Thus nearly all the minority shares cast for the defacto management was voted by proxy. None of the appellees solicited any proxies from any owners of the minority shares for said election, but management had sent out the usual routine and customary request for proxies.

E. H. HALL

Subscribed and sworn to before me this 15th day of October, 1951.

[Seal]

EUGENE P. JONES,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 15, 1951. Paul P. O'Brien,
Clerk.

[In the U. S. Court of Appeals and Cause.]

AFFIDAVIT OF R. S. VAN DUYNE IN BE-
HALF OF APPELLEES' OPPOSITION TO
MOTION FOR INJUNCTION PENDING
APPEAL.

State of California,
City and County of San Francisco—ss.

R. S. Van Duyne, being first duly sworn, de-
poses and says:

I am and for many years have been a custom
broker doing business in San Francisco. My place
of business is at 409 Washington Street, San Fran-
cisco. As a customs broker I have occasion to know
what steamship lines operate in various services,
and I am in a position to find out the number of
ships operated by them in such services.

At the present time there are 5 different steam-
ship companies operating ships in regular service
from San Francisco Bay to Korea, in addition to
Military Sea Transportation Service. The total
number of ships operated by these 5 companies to
Korea is 85. Of these 85 ships 10 only are operated
by American President Lines, Ltd.

R. S. VAN DUYNE

Subscribed and sworn to before me this 15th day
of October, 1951.

PAUL R. McMANUS,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 15, 1951. Paul P. O'Brien,
Clerk.

[In the U. S. Court of Appeals and Cause.]

AFFIDAVIT OF ARTHUR B. POOLE IN SUPPORT OF MOTION OF THE UNITED STATES FOR INJUNCTION PENDING APPEAL.

City and County of San Francisco,
State of California—ss.

Arthur B. Poole, being first duly sworn, deposes and states as follows:

My name is Arthur B. Poole. I am 56 years old. I hold a Bachelor of Arts degree from the University of Minnesota, and have completed the two-year course in the Graduate School of Business Administration at Harvard University. I have held the degree of certified public accountant in Minnesota since 1924, in California since 1939. I served as a Supply Officer in the United States Navy in World War I. I was a practising public accountant 1920-1927, teaching in a school of accountancy during a part of that time. I was employed as financial officer-controller, treasurer, financial vice president, director, financial consultant—in several corporations 1927-1937. I have been since January 1938 treasurer, vice president, and director of American President Lines. I have been a consulting professor in the Stanford Graduate School of Business since 1939. I am a member of the California Society of Certified Public Accountants and of the American Institute of Accountants. I have been responsible for the financial records and accounts of American

President Lines since the reorganization in October 1938.

I have read Mr. E. H. Hall's affidavit of 15 October 1951.

On page 15 Mr. Hall objects to the Capital Assets Valuation Reserve of \$6,350,000 on the ground that only \$789,000 of it was needed to absorb losses on sales of two ships, and that the remainder, \$5,561,000, plus a profit of \$4,613,000 upon the sale of other ships, total about \$10,000,000, "actually represents a part of the 1938 values."

In 1938 the reorganization management found that the Dollar management had grossly failed to take adequate depreciation on the vessels which it owned. The rates of depreciation used were based on assumed useful lives running somewhat indiscriminately from 33 to 51 years. These rates of depreciation were far below the rates taken by the same management on the tax returns they signed, far below the rate established by the Congress in the Merchant Marine Act for subsidized operators (of which the Company was one), far below the rates customarily used in the steamship industry in this and other countries, and far below a rate which would spread the cost of the vessels over their reasonably expectable years of useful service. In fact, if one overlooks entirely the extraordinary write-up by which the Dollar management in 1929 transferred these same ships to American President Lines at more than \$8 millions above cost to predecessor affiliated companies, and if one accepts these new amounts at face value, the Dollar management

had failed by more than \$9.4 millions to provide the normal and standard 5% rate of depreciation. This simply means that measured by the rate of depreciation which the Dollar management had accepted and obligated itself to in the subsidy contract then in force, the losses of the last 9-5/12 years had been understated by \$9.4 millions.

The new Board of Directors in 1938 gave the matter lengthy consideration, appointed a special committee to investigate and report on capital asset valuations, including the Dean of the Stanford Graduate School of Business, received and discussed their findings and recommendations, and voted to have set up accordingly a Capital Assets Valuation Reserve in the amount of \$6,350,000.

In my opinion there is no justification for attempting to carry back to 1938 the events which grew out of World War II, and to credit against the earnings deficit of \$17,642,000 at 31 December 1938 the vessel sales and insurance recoveries which took place during the following nine years.

In fact, the profits taken in later years were booked after millions of dollars of additional depreciation had been taken on the vessels, and after such great changes in ship values and in value of the dollars received, that one cannot in common sense relate them to conditions in 1938 nor to the operations theretofore carried on.

But if one were nevertheless to treat the sale of every vessel coming under the Capital Assets Valuation Reserve as though it had in fact taken place at 31 December 1938, despite the fact that the sales

actually occurred 1940-1947, and even though such treatment cannot logically be defended, the position would not be as Mr. Hall infers. In fact the transactions would become almost uniformly losses:

Book value 31 December 1938 of 14 vessels (all vessels owned except the Presidents Fillmore and Johnson)	\$19,131,024.11
Proceeds of sale of the same vessels, realized in the years 1940-1947	18,251,021.43
Loss	\$ 380,002.68

Again, if one continues to use, for purposes of argument, the fiction of having sold all 14 vessels at 31 December 1938 (actually, at that time there was found no market whatever for the Company's vessels except with scrap steel dealers), and if one were to ignore the real reason for the Capital Assets Valuation Reserve and dismiss it as unnecessary, the result would still be far from the putative \$7 million deficit arrived at on page 15 of Mr. Hall's affidavit:

Deficit accrued to December 31, 1938.....	\$17,642,462.90
Reverse Capital Assets Valuation Reserve.....	6,350,000.00
Remainder	\$11,292,462.90
Add loss on sale of vessels if treated as made 31 December 1938.....	380,002.68
Add inadequacy of reserve for reconditioning fleet at 31 December 1938 (see published report for the year 1939).....	106,924.63
Deficit arrived at under Mr. Hall's assumptions	\$12,279,390.26

On page 16 Mr. Hall excuses Dollar management for incurring in 1938 a very large loss, in part on

the ground that "after January 1938 APL's management was in large part dominated by the Maritime Commission and its financial affairs controlled by the Commission's appointee, Arthur B. Poole." During my employment between 10 January 1938 and 26 October 1938 I saw no evidence of domination by the Maritime Commission. As for myself, the Dollar management was advised in writing 9 December 1937 by the Chairman of the Maritime Commission: "It is not intended that such officer shall exercise control over operations and personnel except through such suggestions and recommendations as he may make * * *" I abided by these instructions.

Farther down on page 16 Mr. Hall says: "In the year 1950 APL sustained a loss after income charges but before subsidy of \$1,179,540, as may be determined from its 1950 annual report." Apparently Mr. Hall has deducted the tentative accrual of operating-differential subsidy, \$6,500,000, from net income before provision for federal income taxes, \$5,320,460, and assumed that loss of subsidy would have resulted in a loss of the difference, \$1,179,540. This is, perhaps, a natural error, but an error just the same. The Company's operations for 1950 resulted in net income before allowance for any operating-differential subsidy.

On page 7 and again on page 16 Mr. Hall reports incorrectly a conversation with me, said to have taken place 21 June 1951. I recall the conversation, but not the date. I did not tell Mr. Hall that "the amount of subsidy that the government had agreed

was certainly payable for the years 1947 to 1950, inclusive, was \$5,500,000." Neither did I tell Mr. Hall that "the subsidy agreed on between APL and the government for the years 1947 to 1950, inclusive, is \$5,500,000." What I did tell Mr. Hall was that we on that day had subsidy vouchers in Washington by which we sought the immediate payment of \$5,500,000. Those vouchers have since been revised as required by the Maritime Administration, and are now being audited in Washington in the amount of \$6,000,000. Additional substantial amounts will be vouched as soon as definitive subsidy rates are established, further vouchers will be submitted upon contract amendments covering the transpacific passenger-freight service, and final vouchers will be submitted upon completion of each calendar year's general audit by the Maritime Commission.

A third time, at the bottom of page 17, Mr. Hall refers mistakenly to my telling him that "of this entire amount (\$19,700,000 of subsidy receivable) only \$5,500,000 is now certain." The \$19,700,000 carried on the books as subsidy receivable is an estimate, but it is an estimate made after years of discussions with Maritime Administration personnel, after viewing much of the foreign-flag vessel cost information obtained by them, after review of a large mass of foreign-flag vessel cost data gleaned throughout the world by our own employees and agents, and after consulting locally in Seattle, New York, and New Orleans with other subsidized operators, some of whom now have definitive post-war subsidy rates. It is my belief that the subsidy event-

ually collected will closely approximate the accrual now carried on the books. An important factor in my belief is the essential character of the Company's three contract services, as determined by the Maritime Commission and Administration, and the important part they play in the military, economic, and political relations of the United States with transpacific countries.

On page 17 Mr. Hall states that \$1,356,000 in certain costs was charged against the Reserve for Contingencies, whereas if there had been no Reserve for Contingencies they would have fallen against income and reduced net income by that amount. It is a fact that such charges were made, the amount being nearly as large as Mr. Hall states. His remarks would be appropriate in principle if the Reserve for Contingencies was an improper provision. But every step beginning with the original Capital Assets Valuation Reserve, continuing through its merger with three other reserves in 1943 to form the new Reserve for Contingencies, and including every entry in those accounts, has been examined, inquired into, and approved by the Company's auditors, Messrs. John F. Forbes & Co., and had the prior express approval and authority of the Board of Directors.

Mr. Hall's final assertion on page 18 is that "In any event the profits for the 12 years, 1939-1950, are closer to \$10,000,000 than to \$30,000,000 or \$825,000 per year." It is not known how Mr. Hall arrived at his amount of \$10 millions, but if one were to accept his own positions and alter the accounts to meet his

own contentions, one cannot arrive at a net income from operations less than over \$24 millions:

Net income including capital gains as reported by Company, and as it appears on annual statements all bearing the certificates of the Company's public accountants, 1939-1950, incl.....	\$30,159,000
Deduct all capital gains, on the unsupportable ground that they are really transactions related to the pre-1939 period.....	4,613,000
Remainder	\$25,546,000
Deduct all charges made against that portion of the Reserve for Contingencies which is descended from the Capital Assets Valuation Reserve, ignoring the cause and basis for the latter reserve	1,314,000
Remainder	\$24,232,000
Add inadequacy of fleet reconditioning reserve at 31 December 1938.....	107,000
Resulting net income 1939-1950, incl., all from operations	\$24,339,000

I am unable to concede the impropriety of any step by which the profit of \$30,159,000 was reached, and the most that can be said for Mr. Hall's position is that for some purposes it would be appropriate to net that amount against some of the charges to the Reserve for Contingencies, leaving a figure of \$28,845,000 (\$30,159,000 minus \$1,314,000).

In sum: Mr. Hall is misinformed about the theory and need behind the Capital Assets Valuation Reserve; he advances an untenable proposal for attempting to push vessel sales and insurance recoveries back into years in which they did not and

could not have occurred; he claims a \$10 million improvement in pre-1939 operating results based on these erroneous assumptions and suppositions; he blames the Maritime Commission and me for the 1938 loss while the Dollar management was in control of the Company; he is unaware of the relation between receipt of operating-differential subsidy and net income before provision for taxes; he misquotes me about the subsidy which has accrued in 1947-1950; his criticism of charges against the Reserve for Contingencies is dependent upon a fallacious assumption as to the nature of the reserve; and he writes down a post-1938 net income of \$30 million to \$10 million by a process which is unwarranted even upon his own assumptions.

/s/ ARTHUR B. POOLE

Subscribed and sworn to before me this 16th day of October, 1951.

[Seal] /s/ SUSIE M. CONKLIN,
Notary Public in and for the City and County of
San Francisco. My Commission Expires July
25, 1953.

[Endorsed]: Filed Oct. 16, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

AFFIDAVIT OF W. K. VARCOE IN BEHALF
OF APPELLANT'S MOTION FOR CON-
TINUATION OF INJUNCTION PENDING
APPEAL.

State of California,
City and County of San Francisco—ss.

W. K. Varcoe, being first duly sworn, deposes and says:

1. I am presently Vice President in charge of Freight Traffic and Director of American President Lines, Ltd. (APL), having been appointed Vice President on May 1, 1949 and Director March 19, 1951. Having had 27 years experience with American President Lines, Ltd., all involving the movement of ships and cargoes, and having worked very closely with the war effort the past few years, I am thoroughly familiar with the activities of APL and steamship companies in the Pacific area in connection with the war effort and make this affidavit on the basis of my experience as above set forth, and on the basis of the records of APL within my control.

2. I have examined the 15 October 1951 affidavit of R. S. Van Duyne, stating that "at the present time there are 5 different steamship companies operating ships in regular service from San Francisco Bay to Korea", and that APL operates 10 of the 85 vessels involved. I do not understand either the assertions or the figures.

3. There are no steamship companies today which

operate in regular commercial service from San Francisco Bay to Korea. There is no commercial service. Likewise, there is no steamship company today which operates in regular service from San Francisco Bay to Korea with owned ships. All service from San Francisco Bay to Korea is under direction of Military Sea Transportation Service and practically all ships in this service are government owned and (1) assigned to MSTS directly by National Shipping Authority (Federal Maritime Board), or (2) assigned to American operators under bareboat charter and in turn time-chartered on per diem basis to MSTS, or (3) under General Agency Agreement (GAA) and in turn assigned to MSTS. APL operates a total of 18 vessels in the last two categories. These 18 ships as all others serving Korea do so strictly under direction of MSTS and do not "regularly" sail to Korea. Thus the same may be said of the vessels operated by others. APL is the largest of the trans-Pacific operators and presumably provides, accordingly, the largest single Korean service.

4. Only infrequently have owned ships served Korea on a space charter basis. American President Lines has under its space contract with MSTS held itself in readiness at all times to handle all military cargoes offered to Korea and will continue to act under the orders and at the direction of MSTS. In addition to general cargo space contracts, APL hold an MSTS reefer contract for 2 fully refrigerated ships, which ships again are entirely under MSTS control.

5. In addition to the above 20 ships APL now operates in its regular berth services 21 ships (19 of which are owned by APL), all of which have handled and will continue to handle at MSTs direction the vital military cargoes to the Far East in support of the Korean war effort.

6. There have been occasions in the past where APL have assigned ship tonnage from its regular berth service for the exclusive use of MSTs in the war effort, and APL is prepared to do so again in the future as and when called upon.

/s/ W. K. VARCOE

Subscribed and sworn to before me this 16 day of October, 1951.

[Seal] /s/ SUSIE M. CONKLIN,
Notary Public in and for the City and County of
San Francisco, State of California. My Com-
mission Expires July 25, 1953.

[Endorsed]: Filed Oct. 16, 1951. Paul P. O'Brien,
Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,130

[Title of Cause.]

Nov. 20, 1951

Before: Stephens, Healy, and Pope, Circuit Judges.

PER CURIAM OPINION

This case is here on appeal by the United States from a summary judgment in favor of appellees, defendants below, to the effect that title to the stock of American President Lines is in the defendants. The United States has moved for an injunction to preserve the status quo pending appeal.

Briefly stated, the ground of the trial court's holding is that, by reason of the intervention of government counsel in the suit of *Dollar v. Land*, the United States is estopped to relitigate the issues determined in that suit by the district and appellate courts of the District of Columbia Circuit. This would seem to be but another way of saying that the judgments there rendered are *res judicata* as regards the claims of the government. The holding appears at war with the repeated pronouncements of the Supreme Court that the judgments entered in *Dollar v. Land* would not be *res judicata* against the United States. *Land v. Dollar*, 330 U. S. 731, 736, 737, 739; *Land v. Dollar*, 341 U. S. 737, 739. That the Supreme Court was not unaware of the intervention of government counsel in those suits is evi-

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denced by the remarks of Mr. Justice Frankfurter in his separate memorandum in *Land v. Dollar*, 341 U. S. 737, 741. He there said that "At every stage, the Commissioners were represented by attorneys from the Department of Justice, who asserted as ground for dismissal that the action was a suit against the United States to which consent had not been given."

In this situation it is appropriate that a stay or supersedeas be granted. Counsel for the government are directed to prepare and submit to the court a proposed form of injunction to preserve the status quo pending appeal. The proposed form of injunction shall be served upon opposing counsel who shall have five days after service to make such further suggestions as they may decide proper.

[Endorsed]: Per Curiam Opinion. Filed Nov. 20, 1951. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

**PRAECIPE FOR RECORD ON PETITION
FOR WRIT OF CERTIORARI**

To the Clerk of the above-entitled court:

The appellees, R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber, are about to file with the United States Supreme Court petition for writ of certiorari to review the judgment entered on October 3, 1951 by the United States District Court for the Northern District of California in the above-entitled cause now pending herein on appeal.

In connection with said petition and pursuant to Rule 39 of the Rules of the United States Supreme Court, you are hereby requested to prepare, certify and transmit to the Clerk of the United States Supreme Court the transcript of the record in the above-entitled cause. Please include therein the following:

1. All matters heretofore designated for printing by "Appellant's Designation of the Parts of the Record to be Printed" filed herein on or about October 26, 1951.

2. All matters heretofore designated by appellees for printing in the "Designation by Appellees R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber of Additional Parts of the Record Deemed to be Material" filed herein on or about November 5, 1951. However, there may be omitted therefrom for the time being the matters specified in Item 6 of appellees' said designation, to wit, Exhibits 1 and 2 to the Request for Admissions of Fact and the Transcript of Record and Supplemental Transcript of Record in the Supreme Court of the United States in Case No. 552, October Term, 1950. Said Exhibit 2 consists of the printed Joint Appendix in 5 volumes to briefs of the parties in the case of Dollar v. Land, et al., printed copies of which are already before the Supreme Court. Said Transcript of Record and Supplemental Transcript of Record are printed copies of the original transcript already before the Supreme Court. It is probable that reference to said Exhibit 1, Exhibit 2, said Transcript of Record and

Supplemental Transcript of Record may be provided for by stipulation between the parties; otherwise said matters may be included in a supplemental transcript of record to be transmitted to the Clerk of the United States Supreme Court in the event said petition for certiorari is granted. Accompanying this praecepe is a mimeographed copy of said Exhibit 1, which may be transmitted in lieu of the original and without printing.

3. The following proceedings occurring in this Court in No. 13,130, to wit:

(a) Notice of Motion of Appellant United States of America for Injunction to Preserve the Status Quo Pending Appeal, filed on or about October 10, 1951, together with said motion (but not including the supporting memorandum);

(b) Affidavit of E. L. Cochrane in support thereof;

(c) Affidavit of E. H. Hall on Behalf of Appellees in Opposition to Motion for Injunction pending Appeal from Final Decree, filed October 15, 1951;

(d) Affidavit of R. S. Van Duyne, filed October 15, 1951;

(e) Affidavit of Arthur B. Poole, filed October 16, 1951;

(f) Affidavit of W. E. Varcoe, filed October 16, 1951;

(g) Opinion of the Court rendered November 20, 1951.

4. This praecipe.

Dated: November 28, 1951.

/s/ HERMAN PHLEGER,
/s/ GREGORY A. HARRISON,
/s/ MOSES LASKY,
/s/ ALVIN J. ROCKWELL,
/s/ BROBECK, PHLEGER &
HARRISON,
Attorneys for Appellees.

Affidavit of Service attached.

[Endorsed]: Filed Dec. 5, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S SUPPLEMENTAL DESIGNA-
TION OF RECORD ON PETITION FOR
WRIT OF CERTIORARI

In connection with a proposed Petition for Writ of Certiorari to be filed in the Supreme Court by Appellees, R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber, to review the judgment entered on October 3, 1951 by the United States District Court for the Northern District of California now pending here on appeal, Appellant requests the Clerk to prepare and transmit to the Clerk of the Supreme Court of the United States, pursuant to Rules 38 and 39 of that Court, a certified transcript of the complete record in Appeals Nos. 12,917, 12,918 and 13,130 in this Court; provided however that:

1. No part of said record need be printed by the Clerk of this court other than the parts designated in the Praecipe for Record on Petition for Writ of Certiorari heretofore filed in this Court by appellees R. Stanley Dollar, et al.; and provided further that

2. There may be omitted from the certified transcript of the complete record, the following:

(a) Exhibit 2 to the request for admissions of fact filed by Appellants R. Stanley Dollar, et al., in the District Court for the Northern District of California on May 15, 1951 (which consists of a five volume printed joint appendix to briefs of appellants and appellees in the case of R. Stanley Dollar, et al. vs. Emory S. Land, et al, Appeal No. 10,299 in the United States Court of Appeals for the District of Columbia Circuit); and

(b) The printed copy of the transcript of record and supplemental transcript of record in the Supreme Court of the United States in Case No. 552, October Term 1950, which were received in evidence in the District Court for the Northern District of California on April 4, 1951 as Dollar exhibits 5 and 6.

Dated: December 7, 1951.

/s/ HOLMES BALDRIDGE,

Assistant Attorney General

/s/ PHILIP H. ANGELL,

Special Assistant to the Attorney
General

Attorneys for Appellant.

[Endorsed]: Filed Dec. 7, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER RESTRAINING TRANSFER OF STOCK, ETC.

Pursuant to the Court's opinion filed November 20, 1951:

It Is Hereby Ordered, until further order of the Court, that for the purpose of preserving the status quo and preventing irreparable injury to the United States pending the appeal, appellees R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and H. M. Lorber be and they hereby are enjoined from taking any action to have issued in their names new certificates representing the 100,145 shares of Class A stock and the 2,100,000 shares of Class B stock of American President Lines, Ltd., in controversy, or to be registered as the owners of said stock and from pledging, selling, transferring or otherwise disposing of said shares or the stock certificates representing said shares; and

It Is Likewise Ordered that American President Lines, Ltd., and its stock transfer agents and stock registrar, Wells Fargo Bank and Union Trust Company, Joseph A. Tognetti, and the Anglo California National Bank of San Francisco be and they hereby are enjoined from issuing any new certificates representing said stock to appellees R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co., and

H. M. Lorber, or from registering said appellees as owners of any of said shares of stock.

/s/ ALBERT LEE STEPHENS,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

United States Circuit Judges.

[Endorsed]: Filed Dec. 14, 1951. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,130

UNITED STATES OF AMERICA,
Appellant,
vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP
LINE, THE ROBERT DOLLAR CO., and
H. M. LORBER,
Appellees.

MOTION BY APPELLANT, THE UNITED
STATES, FOR PERMISSION TO REFER
TO PARTS OF THE RECORD WITHOUT
PRINTING

Now comes appellant, the United States, by its counsel, and moves the Court for an order granting permission to both appellant and appellees to refer in briefs and argument to parts of the records

lodged in this Court on this appeal and on Appeal No. 12,918 without printing such parts.

By designation filed with this Court on October 10, 1951, appellant has designated as the record on appeal the entire record in the District Court in action No. 30407, and that original record is lodged with the Clerk. In addition, in Appeal No. 12,918, appellants R. Stanley Dollar, et al., have designated as the record on that appeal, the record in the related action No. 30428, entitled Dollar, et al., vs. Land, et al., and that original record is also lodged with the Clerk.

In the present appeal, No. 13,130, appellant has designated for printing such parts of the record as appear to be obviously necessary for consideration of this appeal.

Contained in such original records are various other documents to which appellant or appellees may desire to make reference in briefs and argument, but which appellant has not designated for printing because some of them are exceedingly lengthy. For example, Exhibit 1 to appellees, request for admissions of fact is a 137-page stipulation filed in the case of Dollar, et al., v. Land, et al., No. 31468, in the United States District Court for the District of Columbia, and Exhibit 2 to that request is a joint appendix of 2,142 pages in five printed volumes in the case of Dollar, et al., v. Land, et al., No. 10299, in the United States Court of Appeals for the District of Columbia Circuit. The inclusion of such documents in the printed record on this appeal would obviously delay the time re-

quired to print the record and would entail considerable expense.

Accordingly, in the interests of the expeditious administration of justice, it seems desirable for this Court to grant permission to all parties to this appeal to refer in briefs and argument to any part of the original records in Appeals Nos. 13,130 and 12,918 even though not printed in the present record on appeal.

Respectfully submitted,

/s/ HOLMES BALDRIDGE,
Assistant Attorney General.

/s/ EDWARD H. HICKEY,
Atty., Department of Justice.

/s/ PHILIP H. ANGELL,
Special Assistant to the
Attorney General.

/s/ DONALD B. MacGUINEAS,
Attorney, Department of Justice, Attorneys for
Appellant United States.

/s/ ALBERT LEE STEPHENS,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,
Judges, U. S. Court of Ap-
peals for the Ninth Circuit.

Certificate of Service

I hereby certify that I have delivered copies of the foregoing Motion by Appellant, the United States, for Permission to Refer to Parts of the Record Without Printing, on October 26th, 1951, to counsel for appellees at their respective offices in San Francisco.

/s/ PHILIP H. ANGELL,
Special Assistant to the
Attorney General.

[Endorsed]: Filed Jan. 31, 1952.

No. 13130

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE
ROBERT DOLLAR CO., AND H. M. LORBER, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

BRIEF FOR APPELLANT

HOLMES BALDRIDGE,
Assistant Attorney General.

PHILIP H. ANGELL,
*Special Assistant to the
Attorney General.*

EDWARD H. HICKEY,
DONALD B. MacGUINEAS
*Attorneys, Department of Justice,
Attorneys for Appellant.*

FILED

FEB 11 1952

PAUL P. O'BRIEN,
CLERK



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In the United States Court of Appeals for the Ninth Circuit

No. 13130

UNITED STATES OF AMERICA, APPELLANT,

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE
ROBERT DOLLAR CO., AND H. M. LORBER, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by the United States from an order entered on October 3, 1951, by the United States District Court for the Northern District of California, Southern Division, granting the motion of appellees (defendants below) for summary judgment and dismissing with prejudice the complaint of the United States to quiet title to the controlling shares of stock of American President Lines, Ltd., as to which appellees are adverse claimants. The opinion and order of the court below appear at R. 282-307 and are reported in *United States v. Dollar*, 100 F. Supp. 881.

The court below had jurisdiction of the action under 28 U.S.C. 1345. Appellant filed its notice of appeal on

October 4, 1951 (R. 308). This court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

A. *The Complaint.* On March 12, 1951, appellant, the United States, filed its complaint against appellees (the Dollar defendants), American President Lines, Ltd., and its stock transfer agents, alleging that the United States is the true and lawful owner of certain shares of common stock of American President Lines which constitute approximately 92% of the voting stock, title to which the United States had acquired from appellees under an agreement entered into August 15, 1938, for the reorganization of American President Lines, which was then named Dollar Steamship Lines, Inc., Ltd. (R. 3, 6-7).

The complaint referred to the decision by the Court of Appeals for the District of Columbia Circuit in *Land v. Dollar*, 188 F.2d 629, as to which the Supreme Court denied a petition for a writ of certiorari on the day the complaint was filed (*Land v. Dollar*, 340 U.S. 948), and alleged that the United States was not a party to the *Dollar v. Land* litigation in the District of Columbia, was not bound or concluded by the judgment therein, and that that judgment had not divested the United States of its title to or right to possession of the stock (R. 6-8).

The complaint also alleged that the Dollar defendants claimed to own the stock and were making demands upon American President Lines and its transfer agents to have new certificates issued to them and to be registered as owners of the stock; that the stock has a unique

value; and that the wrongful claim of title by the Dollar defendants constitutes a cloud on the title of the United States (R. 8-12).

The complaint prayed for interlocutory relief and for final relief in the form of an injunction restraining the Dollar defendants from obtaining new stock certificates and from being registered as owners of the stock, a declaratory judgment that the United States is the lawful owner of the stock, and the recovery of damages from the Dollar defendants for their cloud on the title of the United States (R. 14-6).

B. The Preliminary Injunction. On March 19, 1951, the United States moved the court below for a preliminary injunction to preserve the status quo pending adjudication of the conflicting claims to the title to the stock by restraining the registration of the Dollars as owners of the stock (R. 56). This motion was supported by the verified complaint and by affidavits showing that because of the vital role of American President Lines in connection with military operations in Korea, even a temporary disruption of its present efficient management would create irreparable injury to the public interest (R. 64).

On March 20 American President Lines filed in the court below a motion for instructions, pointing out that it was being subjected to conflicting claims of ownership of the stock by appellant and by appellees.¹

On March 21, 1951, the Dollars filed in the court be-

¹ The entire original record in the court below is lodged in this court, pursuant to appellant's designation (R. 312). This court has pending before it appellant's motion for permission to refer to parts of the record not printed.

low, in an action entitled *Dollar, et al. v. Land, et al.*, No. 30428, an application for enforcement of an order entered by the United States District Court for the District of Columbia in the *Dollar v. Land* litigation there (which the Dollars had registered in the court below pursuant to 28 U.S.C. 1963) and for civil contempt proceedings against a Department of Justice attorney who had filed the quiet title action of the United States and other Government officials.²

The court below (Harris, J.) consolidated these proceedings and on April 6, 1951, after a full hearing, filed an opinion holding that the United States was not bound by the District of Columbia litigation; that the action of Government counsel and other Government officials did not constitute contempt of court, but was, on the contrary, pursuant to their duty to protect the interests of the United States in the stock; and that in order to prevent irreparable injury, the United States was entitled to a preliminary injunction to preserve the status quo pending a final determination of the issue as to ownership of the stock. He also ordered the rule to show cause in contempt discharged (R. 134).³ *United States v. Dollar*, 97 F. Supp. 50 (N.D. Cal.).

On April 11 Judge Harris entered a preliminary injunction which restrained the issuance of new stock certificates to the Dollars and their registration as owners of the stock (R. 161).

² See footnote 1, page 3, *supra*.

³ On April 20, 1951, the Dollars appealed to this Court from the order of Judge Harris discharging the contempt rule (Appeal No. 12,918) (R. 173). This Court still has pending before it the Dollars' motion to remand the contempt case to the district court.

C. *This Court's Denial of the Dollar Motion to Stay the Injunction Pending Appeal.* On June 22, 1951, this Court denied the motion of the Dollars for a stay of the preliminary injunction pending appeal, pointing out that fundamental issues in this litigation are before the Supreme Court in the *Dollar v. Land* litigation. *Dollar v. United States*, 190 F. 2d 547 (C. A. 9).⁴

D. *The Dismissal of the Complaint.* In May, 1951, District Judge Murphy succeeded District Judge Harris as the judge assigned to hear motions in the court below, and the Dollars on May 22 moved to dismiss the complaint and for summary judgment (R. 257). On October 3, 1951, Judge Murphy entered the order from which this appeal is taken, granting the Dollars' motion for summary judgment, decreeing that the Dollars are the owners of the stock, and dismissing the quiet title complaint of the United States with prejudice, on the ground that the United States is concluded by the *Dollar v. Land* litigation because Department of Justice attorneys represented the Government officials who were sued in their individual capacities in that action (R. 290-305). *United States v. Dollar*, 100 F. Supp. 881, 885.

E. *This Court's Grant of an Injunction Pending Appeal.* On November 20, 1951, this Court granted appellant's motion for an injunction to preserve the status quo pending appeal, stating that Judge Murphy's holding "appears at war with the repeated pronouncements of the Supreme Court that the judgments entered in

⁴ On April 20, 1951, the Dollar defendants appealed to this Court from the issuance of the preliminary injunction (Appeal No. 12,917) (R. 172). On January 10, 1952, this Court dismissed that appeal.

Dollar v. Land would not be res judicata against the United States'' (R. 368). *United States v. Dollar*, 192 F. 2d — (C. A. 9).⁵

F. *Present Status of Proceedings in the Supreme Court.* On January 7, 1952, the Supreme Court denied the Dollars' petition for certiorari to review Judge Murphy's order of dismissal in advance of decision by this Court. *Dollar v. United States*, No. 494, October Term, 1951.

The Supreme Court now has before it writs of certiorari granted on June 4 and November 13, 1951, to review orders entered in *Dollar v. Land* by the District of Columbia Court of Appeals (1) restraining Government officials from defending or taking advantage of Judge Harris' preliminary injunction, and (2) holding Government officials in civil contempt for, among other things, obtaining that preliminary injunction. *Land v. Dollar*, 341 U.S. 737; *Sawyer v. Dollar*, No. 247, and *In the Matter of George L. Killion*, No. 248, October Term, 1951. These cases have not yet been set for argument.

The Supreme Court also has still pending before it a petition for reconsideration of denial of certiorari to review *Dollar v. Land* on the merits. *Land v. Dollar*, No. 353, October Term, 1950.

SPECIFICATIONS OF ERRORS RELIED ON

The district court erred:

1. In holding that the United States is concluded by

⁵ On December 14, 1951, this Court entered its order enjoining the registration of the Dollars as owners of the stock, pending this appeal (R. 374).

the judgments of the District of Columbia courts in the *Dollar v. Land* litigation by way of res judicata or "collateral estoppel" because the Department of Justice represented the individual defendants in that litigation.

2. In disposing of the action by summary judgment, since there was a genuine issue as to a material fact to be tried—whether the parties to the adjustment agreement of August 15, 1938, intended that absolute title to the stock in controversy be transferred—and appellees were not entitled to judgment as a matter of law.

3. In granting appellees' motion for summary judgment, in adjudicating that appellees are the owners of the stock, and in dismissing the complaint.

SUMMARY OF ARGUMENT

1. The United States was not a party to *Dollar v. Land* and is not concluded by judgment there. It has six times been so held in that litigation, notwithstanding that the Supreme Court and the District of Columbia Court of Appeals have been well aware that the individual defendants were represented by the Department of Justice. As this Court stated in its opinion of November 20, 1951, Judge Murphy's use of "collateral estoppel" is but another way of saying res judicata.

Beginning with *Carr v. United States*, 98 U.S. 433, and *United States v. Lee*, 106 U.S. 196, the Supreme Court has held time and time again that Department of Justice representation of public officials sued as individuals cannot make the United States bound by the judgment in such suit. The Attorney General has no

authority to waive sovereign immunity even if he wished to do so, which he did not here.

2. It was error to decide this case by summary judgment, which is not to be granted where there is the slightest doubt as to the facts. Here the *Dollar v. Land* trial record shows that there is a substantial issue of fact as to whether the parties intended to transfer outright title to the stock.

Stare decisis may not be used to prevent the United States from showing here that the conclusion of the District of Columbia Court of Appeals as to the nature of the stock transfer was erroneous. The United States is entitled to make a new record on the trial here and it has substantial new evidence. The affidavit of Dollar counsel to the contrary was insufficient to justify summary judgment and is, moreover, demonstrably false.

Summary judgment was wholly inappropriate in a case such as this involving complex issues of public importance, with credibility of witnesses in issue and the ultimate issue of fact in sharp dispute.

ARGUMENT

I.

The United States is not concluded by the *Dollar v. Land* litigation by way of res judicata or "collateral estoppel" notwithstanding the fact that the Department of Justice represented the individual defendants in that litigation.

The fundamental error of the court below is its holding that because the Department of Justice represented the members of the Maritime Commission and the Secretary of Commerce, in their individual capacities, in the *Dollar v. Land* litigation in the District of Columbia

courts, the United States is now bound, by principles of *res judicata* or “collateral estoppel” from litigating in its quiet title action here the issue as to whether the United States or the Dollars are the true owners of the stock.

As this Court pointed out in its opinion of November 20, 1951, granting appellant’s motion for an injunction pending appeal, Judge Murphy’s holding seems to be “but another way of saying that the judgments there rendered [in *Dollar v. Land*] are *res judicata* as regards the claims of the government,” and appears contrary to the Supreme Court’s holdings in *Dollar v. Land* (R. 368).

The Dollars have maintained the District of Columbia litigation on the basic premise that it is not a suit against the United States, or its alter ego, the Maritime Commission, which are not and could not be made parties, but is rather an action against individual tortfeasors withholding possession of the Dollars’ property. When *Dollar v. Land* first went to the Supreme Court on the jurisdictional question as to whether the suit was an unconsented suit against the United States, the Dollars specifically represented that it would not be *res judicata* against the United States.⁶

⁶ In their brief in the Supreme Court the Dollars stated, “since no judgment against the United States is sought, no decision in the case will be *res judicata* with respect to the title of the United States but will only conclude the rights of the parties *inter se*” and cited the following cases specifically holding that an action by a claimant to property to recover it from a Government official is not *res judicata* against the Government: *United States v. Lee*, 106 U.S. 196; *Tindal v. Wesley*, 167 U. S. 204, 223; *Blondet v. Hadley*, 144 F. 2d 370 (C. A. 1) (Brief for Respondents in *Land v. Dollar*, No. 207, October Term, 1946, p. 74).

1. The Supreme Court, this Court, and the District of Columbia Court of Appeals have repeatedly held that the United States is not bound by *Dollar v. Land*.

The Supreme Court and the District of Columbia Court of Appeals have six times held in *Dollar v. Land* that judgment there would not be *res judicata* against the United States. Thus, in *Land v. Dollar*, 330 U.S. 731, 736, 737, 739, the Supreme Court, in holding that if the Dollars' allegations were proved, the action would not be one against the sovereign, three times stated that the "judgment would not be *res judicata* as against the United States." And in *Land v. Dollar*, 341 U.S. 737, 739, the Supreme Court referred to the quiet title suit brought by the United States here, and reiterated "We have heretofore held that judgments entered in the instant case would not be *res judicata* against the United States. *Land v. Dollar*, 330 U.S. 731, 736, 737, 739 (1947)."

The District of Columbia Court of Appeals has likewise consistently recognized that any judgment in *Dollar v. Land* would not be binding on the United

⁷ Likewise, the Chief Justice in his opinion of April 17, 1951, granting a stay of enforcement of an order of the District of Columbia Court of Appeals pending certiorari (granted June 4), stated:

"This Court affirmed the Court of Appeals because the suit was directed against Land et al. as individuals, so that neither the United States nor the Maritime Commission were necessary parties and any judgment in the action would not be binding upon the United States under principles of *res judicata*. *Land v. Dollar*, 330 U. S. 731 (1947)."

A copy of the Chief Justice's opinion on his stay order is filed with this court as Exhibit 4 to the supplementary memorandum filed by the United States on May 31, 1951, in Appeal No. 12917, in opposition to the Dollars' motion to stay Judge Harris' preliminary injunction pending appeal.

States.⁸ Thus that Court of Appeals, in modifying a judgment of the District Court which purported to quiet title to the stock in the Dollars (which the defendants contended was an attempt to make the judgment *res judicata* against the United States) to provide merely that the Dollars were entitled to “effective possession” of the stock “as against defendants” Land, et al., said:

The result, which is inescapable from the very nature of the controversy, is paradoxical. In an action between a private individual and a public official, the court decides that the United States has no interest in the property involved and so the action will lie, but the ensuing judgment is effective only as to the parties before the court and is not *res judicata* against the United States, not a party. *Land v. Dollar*, 188 F. 2d 629, 631 (C.A. D.C.).

Again, the District of Columbia Court of Appeals in its opinion on the issuance of a rule to show cause why certain Government officials should not be held in contempt of court said:

What then is the meaning of the further holding of the [Supreme] Court that the “judgment would not be *res judicata* as against the United States”? Obviously it meant that, although the judgment would determine the issues between the parties, it would not determine them so far as the United

⁸ In its opinion on the merits holding that the Dollars had merely pledged their stock to the Maritime Commission, that court disposed of the defendants’ contention that the suit was an unconscionable suit against the United States by stating that “the United States is not a necessary party.” *Dollar v. Land*, 184 F. 2d 245, 257 (C.A. D.C.).

States, as such, separate and apart from the officer-parties to the suit, is concerned.

Land v. Dollar, 190 F. 2d 366, 371 (C.A. D.C.)

In that same opinion the Court of Appeals discarded the Dollars' contention that representation of the defendants by the Department of Justice concluded the United States. It referred to the quiet title action here and to the fact that "The Attorney General of the United States, through his deputies and assistants, was counsel" for the defendants in *Dollar v. Land* and stated:

What the United States seems to assert is the right knowingly to stand aloof throughout a judicial proceeding and, when issues have been finally decided adversely to its views, *to reassert those same issues by its same agents and its same counsel in another proceeding in another court.* Under the rules respecting the forms of legal proceedings, *it has that right* but in the present instance the right involves nothing of undetermined substance. [Italics supplied.]

Land v. Dollar, 190 F. 2d 366, 375 (C.A. D.C.)

Finally, the District of Columbia Court of Appeals in its opinion holding Government officials in contempt of court again recognized that the United States has the right to litigate in the California quiet title suit the same issues litigated between the Dollars and Land in the District of Columbia suit, and said:

It may well be that the rule of *non res judicata* should give way when it serves no practical purpose, when the facts, the persons, and the law in the proposed litigation are identical with those in the litigation finally concluded by decree. *But it is not for this court to attempt to create a varia-*

tion to the rule as established by the Supreme Court. * * * It [the rule of non res judicata] means merely that if, in the suit of the United States to quiet title, the Dollars should counter with a plea of res judicata, they could not prevail on that ground. [Italics supplied.]

Sawyer v. Dollar, 190 F. 2d 623, 645, 647 (C.A. D.C.)

Thus the District of Columbia Court of Appeals, notwithstanding its strong views that the action of the Government officials in seeking interlocutory relief in the quiet title suit here constituted a contempt of that court, did not undertake to overrule the holdings of the Supreme Court that the *Dollar v. Land* litigation is not res judicata against the United States. Judge Murphy, however, in dismissing the Government's complaint below, in effect did just that.

Judge Murphy pointedly refrained from citing these rulings in *Dollar v. Land*. He was forced to concede that the *Dollar v. Land* litigation is not res judicata against the United States on the issue of title to the stock, but he used "collateral estoppel" to reach precisely the same result as if *Dollar v. Land* were res judicata (R. 298-305). The result reached is inconsistent with Judge Murphy's own statement that "collateral estoppel * * * is encompassed within the broad doctrine of res judicata" (R. 292).⁹ As this Court pointed

⁹ "Collateral estoppel" or "estoppel by judgment" is a limited application of the principle of res judicata. See *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F. 2d 82, 84 (C.A. 3); *Restatement, Judgments*, § 68, Comment a (p. 294). It applies only when the parties to the first action (or their privies) are parties to the second action. If the second suit is brought upon the same cause of action as the first, judgment in the first action is res judicata not only as to every issue determined but also as to any issue

out in its opinion of November 20, 1951, collateral estoppel is but another way of saying *res judicata* (R. 368). *United States v. Dollar*, 192 F. 2d—(C.A. 9).¹⁰

As this Court recognized in its opinion of November 20, it is perfectly obvious that both the Supreme Court and the District of Columbia Court of Appeals have been aware throughout the *Dollar v. Land* litigation that the defendants there were being represented by the Department of Justice. Indeed, in later stages of that case the Dollars presented to those courts their contention that that legal representation bound the United States. Thus, the Dollars in their memorandum in support of their motion to dismiss the appeals which were the subject of the opinion of the Court of Appeals in *Land v. Dollar*, 188 F. 2d 629, argued "The United States is bound because the Attorney General and those acting under his direction defended the case on its merits" and cited some of the very authorities relied upon by Judge Murphy.¹¹ Nevertheless, that Court

which might have been raised in the first suit. But if the second suit is brought upon a different cause of action, judgment in the first suit works an estoppel only as to issues actually litigated and determined. *Cromwell v. County of Sac*, 94 U.S. 351; *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-8; *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-9; *United States v. Munisingwear, Inc.*, 340 U.S. 36, 38.

¹⁰ In the court below counsel for the Dollars frequently described their defense as "*res judicata*". Tr. of March 29, 1951, pp. 243, 250-1; Tr. of April 4, 1951, p. 124.

¹¹ *Restatement, Judgments* § 84; *Souffront v. Compagnie des Sucreries*, 217 U.S. 475.

of Appeals specifically held that the judgment there was not *res judicata* against the United States (see pages 11-3, above).

Similarly, the Dollars in their brief in opposition, p. 18, footnote, filed in the Supreme Court in *Land v. Dollar*, No. 552, October Term 1950, asserted that the fact that "the Department of Justice tried and handled the case" was "a material fact" "If the question of *res judicata* should arise in some proceeding" and again cited some of the authorities relied upon by Judge Murphy.¹²

Again the Dollars in their brief in opposition, page 19, footnote, in *Land v. Dollar*, No. 697, October Term, 1950, stated that their contention on *res judicata* rested on the fact that "the United States through the Department of Justice *thereafter* handled the defense on the merits, wholly controlled the case, and did so to protect its own interest", and again cited more of the authorities relied upon by Judge Murphy.¹³ Nevertheless, the Supreme Court granted that petition for certiorari and reiterated its view that *Dollar v. Land* is not *res judicata* against the United States, with a separate memorandum by Mr. Justice Frankfurter pointing out that the Department of Justice had repre-

¹² The same authorities cited in footnote 11, page 14, above.

¹³ The additional authorities cited by the Dollars to the Supreme Court and relied on by Judge Murphy are *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F. 2d 82 (C.C.A. 3); *Drummond v. United States*, 324 U.S. 316; *United States v. Candelaria*, 271 U.S. 432.

sented the defendants throughout. *Land v. Dollar*, 341 U.S. 737.¹⁴

Judge Murphy completely ignored this Court's holding in *Dollar v. United States*, 190 F. 2d 547, 548, that:

* * * it appears to be recognized and conceded that such determinations [in *Dollar v. Land*] were

¹⁴ See the concurring opinion of Mr. Justice Douglas (who was the author of the Supreme Court's first opinion in *Land v. Dollar*) in *Georgia Railroad & Banking Co. v. Redwine* (No. 1, Oct. Term, 1951, decided January 28, 1952) in which he said: "There were no special circumstances, as in *Land v. Dollar*, 330 U.S. 731, that would keep the suit from being res judicata against the state."

Likewise the Dollars, in their brief in opposition (p. 10) to the petition for certiorari on behalf of Charles Sawyer, Secretary of Commerce, and other Government officials to review the contempt order of the District of Columbia Court of Appeals in *Dollar v. Land*, stated: " * * * should a writ be granted, we shall ask the Court to hold that the United States is concluded on principles of collateral estoppel * * * The issue of collateral estoppel has been raised as a defense in the San Francisco suit", and submitted to the Supreme Court a copy of Judge Murphy's opinion so holding.

The Dollars further suggested that the petition for certiorari in No. 247 be denied as moot because of Judge Murphy's order of October 3. See Respondents' Memorandum Calling Attention to Changed Circumstances by Reason of Event of October 3, 1951, and Suggesting that Nos. 32, 34, 247, and 248 are Moot, and that the Orders Granting the Petitions for Writs of Certiorari in Nos. 32 and 34 be Vacated.

The Supreme Court nevertheless granted that petition for certiorari. *Sawyer v. Dollar*, No. 247, October Term, 1951.

Finally, the Supreme Court on January 7, 1952, denied the Dollars' petition for certiorari in which they again urged the correctness of Judge Murphy's holding. Pet. for Cert., pp. 11-5, in *Dollar v. United States*, No. 494, Oct. Term, 1951.

not binding upon the United States. It would seem to follow that the right of the United States to institute the action below cannot be questioned, nor do we understand that it is argued that the United States may not prosecute that action.

2. Earlier Supreme Court decisions likewise establish that the United States is not bound by *Land v. Dollar*.

The holdings in *Dollar v. Land* that the United States is not bound by proceedings there, although it was apparent that the Department of Justice represented the individual defendants, are in accordance with earlier decisions in which the Supreme Court has specifically held that the use of Government attorneys and Government funds to defend the individual who holds possession of property on behalf of the United States does not make the United States concluded or estopped by the judgment in such action.

In *Carr v. United States*, 98 U.S. 433, the Government brought a suit to quiet title to land in San Francisco against an adverse claimant, who relied upon three judgments in his favor against the Government officials in possession. In two of those proceedings "The question of title was gone into"; in the third the "judgment would not have been decisive upon the title." 98 U.S. at 436-7. The individual defendants were represented by the United States District Attorney and by counsel employed by the Secretary of the Treasury. Carr contended that this legal representation was "sufficient to make the United States a virtual party to said actions, and to conclude them by the

judgment therein.” 98 U.S. at 437. The Supreme Court, however, rejected Carr’s contention, held that the United States was not estopped, and affirmed a decree quieting the title of the United States. The Court stated that the Secretary of the Treasury “may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And in fact, he had no authority to waive those rights.” 98 U.S. at 438.

The *Carr* case is a precise analogy here. The District of Columbia courts in an action by the claimants (the Dollars) against Government officers holding custody on behalf of the United States (Land, et al.) has found that the claimants are entitled to possession as against the Government officers and in connection therewith has said that the United States does not have title to the stock. The United States then brings its quiet title action here; and the Dollars, just as Carr did, contend that the Government is estopped by the judgment in *Dollar v. Land* because the Government assumed the defense of the suit against the officers as individuals. Judge Murphy has accepted this contention held unfounded by the Supreme Court.

Judge Murphy “with all due deference” suggests that the Carr case “is at odds with modern doctrines as to both estoppel and immunity” (R. 302). The Supreme Court appears to think otherwise. It explicitly reaffirmed this holding of the *Carr* case in *United States v. Lee*, 106 U.S. 196, 216-7, 222 (see p. 21 *infra*), and has never since intimated any disapproval of that holding. On the contrary the Supreme Court

continues to cite *Carr* with approval in its more recent decisions on this point.¹⁵ See *United States v. Shaw*, 309 U.S. 495, 501, stating, " * * * without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction"; *Minnesota v. United States*, 305 U.S. 382, 388-9, stating, "Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give any court jurisdiction of a suit against the United States"; *Hussey v. United States*, 222 U.S. 88, 93, holding that representation of Government officials by the Department of Justice does not estop the United States; *Stanley v. Schwalby*, 162 U.S. 255, 270, holding that the Attorney General cannot submit the United States to the court's jurisdiction in a suit brought against its officers. See also *Illinois Central R. Co. v. State Public Utilities Comm.*, 245 U.S. 493, 504-5.

Judge Murphy also sought to reconcile his holding with the *Carr* case by the proposition (to us, self-inconsistent) that although the title of the United States could not be concluded in the suit against the officer, the United States nevertheless will not be permitted to litigate its title in the quiet title action unless it demonstrates "that a substantial factual issue was present other than that decided in *Dollar v. Land*" (R.

¹⁵ The only statement in the *Carr* case disapproved in the *Lee* case was the dictum that when it appears in a suit against an officer that he is holding possession on behalf of the Government, "the jurisdiction of the court ought to cease." See 98 U.S. at 438; 106 U.S. at 216, 217.

303-4).¹⁶ Of course there is not a word in the *Carr* decision to suggest any such requirement.

On the contrary, in *Tindal v. Wesley*, 167 U.S. 204, 223, in which the Supreme Court reaffirmed its holdings that the sovereign is not concluded by the judgment in a suit against the official holding possession, the Court said:

It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; *and the record in this case will not be evidence against it for any purpose touching the merits of its claim.* [Italics supplied.]

¹⁶ This seems to confuse the res judicata issue with the question of the propriety of summary judgment procedure here, which we discuss at pp. 34-53, *infra*. For purposes of the res judicata discussion it is sufficient to point out that the provisions of the Federal Rules of Civil Procedure for summary judgment cannot affect the immunity of the United States from suit. *United States v. Sherwood*, 312 U.S. 584, 589-90.

Furthermore, Judge Murphy's statements that the United States has no new evidence to present in the quiet title trial¹⁷ are contradicted by the record (R. 70; see R. 309-12 and pages 49-52, *infra*), as Judge Harris recognized in his opinion on the preliminary injunction (R. 146).

United States v. Lee, 106 U.S. 196, was a suit in ejectment by claimants to land to recover its possession. The defendants were army officers holding under title asserted by the United States. They were represented by the Attorney General. Nevertheless, the Supreme Court held, in reliance upon the *Carr* case, that judgment in that action would not be conclusive against the United States. The court said that such "action was equally inconclusive against the United States, whether the persons sued were officers of the government or not" (p. 217), and continued:

That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that [the *Carr*] case, and was all that was decided. * * *

* * * since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can

¹⁷ Judge Murphy said, wholly without warrant: "And there is no pretense made that the Government is now seeking to relitigate the very same issues *upon the identical record* out of other than sheer disgruntlement over the failure of its prior efforts." (R. 301) [*Italics supplied*].

bind or conclude the government, as is decided by this court in the case of *Carr v. United States*, already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. * * * (106 U.S. at 217, 222).

Other decisions of the Supreme Court reiterate the rule of the *Carr* and *Lee* cases that the sovereign is not concluded by the judgment in a suit against officials who hold property under a claim of title by the Government, although in all such cases the defendant was represented by the Government's law officers. *Scranton v. Wheeler*, 179 U.S. 141, 152-3, holding that such judgment "will not prevent it [the United States] from instituting a suit for the direct determination of its rights," *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 452, holding that such judgment would "not conclude the United States"; *McClellan v. Carland*, 217 U.S. 268, 282, stating that the sovereign's "rights would not have been concluded by any adjudication made therein"; *Tindal v. Wesley*, *supra*; and *Stanley v. Schwalby*, *supra*, holding that "the United States would not be bound or concluded by the judgment against their officers." ¹⁸

¹⁸ There are a number of decisions by the courts of appeals and the district courts to the same effect. *Scranton v. Wheeler*, 57 F.

See also the cases holding that a judgment against a Collector of Internal Revenue, sued in his private capacity, is not *res judicata* against the Commissioner of Internal Revenue or the United States. *Sage v. United States*, 250 U.S. 33; *Bankers Coal Co. v. Burnet*, 287 U.S. 308, 311-2; *Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, 627; *United States v. Kales*, 314 U.S. 186, 199-200; *United States v. Nunnally Investment Co.*, 316 U.S. 258.

Similarly, in many other cases the fact that the Government officials sued were represented by the Department of Justice did not deter the Supreme Court from holding that the courts had no jurisdiction to adjudicate the Government's property rights, which would not be so if the United States could be concluded by the judgment in the suit against the officer. *Minnesota v. United States*, 305 U.S. 382; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682; *Belknap v. Schild*, 161 U.S. 10.

3. The Attorney General has no authority to waive sovereign immunity in *Dollar v. Land*; hence his representation of the defendants there could not bind the United States to the judgment even if he had sought to do so, which he did not.

Neither the Attorney General nor any of his sub-

803, 807 (C.C.A. 6), reversed on another ground, 163 U.S. 703; *Crane v. United States*, 44 C. Cls. 324, 354-5, affirmed 222 U.S. 88, 93; *Stone v. Interstate Natural Gas Co.*, 103 F. 2d 544, 547 (C.C.A. 5), affirmed *per curiam* 308 U.S. 522; *United States v. Van Horn* 197 F. 611, 617 (D. Colo.); *United States v. McIntosh*, 2 F. Supp. 244, 255 (E.D. Va.); *Blondet v. Hadley* 144 F. 2d 370, 371-2 (C.A. 1); *Correa v. Barbour*, 71 F. 2d 9, 12 (C.C.A. 1); *Wood v. Phillips*, 50 F. 2d 714, 717 (C.C.A. 4); *Appalachian Electric Power Co. v. Smith*, 67 F. 2d 451, 456-8 (C.C.A. 4).

ordinates in the Department of Justice has any power or capacity to waive the sovereign's immunity from suit. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-4; *United States v. Shaw*, 309 U.S. 495, 500-1; *Minnesota v. United States*, 305 U.S. 382, 388-9; *Munro v. United States*, 303 U.S. 36, 41. As stated in *Stanley v. Schwalby*, 162 U.S. 255, 270:

Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers.

Accordingly, the fact that the Department of Justice attorneys who tried *Dollar v. Land* occasionally referred from force of habit to "the Government" rather than to "the defendants" (R. 265-75)—and even in such references it was plain that the court and counsel all understood that the action was against Land et al. as individuals and the United States was not a party—is entirely without legal significance.¹⁹ Those attor-

¹⁹ The statement of the Department of Justice attorney, quoted by Judge Murphy, to the effect that the United States was the client (R. 268,295) was strictly correct, for the statement was made in connection with a request by Dollar counsel for the production of a letter to the Maritime Commission from its special counsel, as to which the Department of Justice attorney asserted the attorney-client privilege (R. 267). In arguing against the privilege Mr. Lasky, Dollar counsel, stated: "If there was an attorney client relationship here, the client was the United States Maritime Commission. The United States Maritime Commission is not a party to this suit. The party against whom testimony is

neys could not have submitted the United States' title to the stock to adjudication in *Dollar v. Land* even if they had attempted to do so (and their references to "the Government" certainly were not such attempts).

The representation by the Department of Justice of the officials who were sued as individuals in *Dollar v. Land* (as well as in all the other cases cited above) was undertaken pursuant to the broad provisions of 5 U.S.C. 309, 316, authorizing the Attorney General "whenever he deems it for the interest of the United States * * * [to] conduct and argue any case in any court of the United States in which the United States is interested." See Department of Justice Circular No. 4122, stating: "It has long been the general policy of the Department to afford counsel and representation to Government employees and servicemen who are sued civilly or charged with violation of local or state criminal laws

offered cannot assert the privilege, if he was not the privileged client." (Tr. *Dollar v. Land*, p. 705).

In connection with the statement of the Department of Justice attorney, quoted by Judge Murphy, that "in taking the view that the Government is the real party in interest" (R. 267), Mr. Harrison, Dollar counsel, stated: "I am confused by the statement of counsel that the Government was in this case. This was an action brought against individuals. Individuals are defendants here. The Government has not pleaded its title. The Government has not intervened, and therefore the Government is not, as I understand it, a party to this suit" (R. 266). In response to the Court's question: "Is the Government in this picture," the Department of Justice attorney replied: "I assume that our position will be as stated in the Supreme Court [i.e., *Land v. Dollar*, 330 U.S. 731], and dependent upon the answer" (R. 266). He also said "That is correct", in reply to the Court's statement that "The individual members of the Maritime Commission" "are individually responsible" "in the nature of tort" (R. 266-7).

as a result of the performance of their official duties.”

The United States was interested in *Dollar v. Land* not because its property rights in the stock could be there adjudicated, but because, having regard to the efficient administration of government, it is to the interest of the United States that Government officials who are sued with respect to allegedly improper or illegal acts performed by them under color of office not be compelled to retain private counsel at their own expense to defend such suits. If Government officials were required to defend suits of this type out of their own pockets, few responsible persons would assume such risks of Government service, and those who did would be deterred from performing their duties with the requisite zeal and selfless devotion to the public interest. *Booth v. Fletcher*, 101 F.2d 676, 681-3 (C.A. D.C.); see also *Spalding v. Vilas*, 161 U.S. 483, 498; *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A. 2).

4. The authorities relied on by the court below are inapposite.

The only cases cited by Judge Murphy which have any relevance to the issue as to whether the United States can be concluded by the judgment in a suit against its officers because they are represented by the Department of Justice are *United States v. Candelaria*, 271 U.S. 432; and *Drummond v. United States*, 324 U.S. 316 (R. 304-5). Both are distinguishable.

In the *Candelaria* case the Indian tribe whose interests the United States represented through Government counsel was *plaintiff* in the action pleaded as *res judicata*. Of course, no question of Government immunity is involved where the United States is plaintiff

in the original action. This distinction was made in *Carr v. United States*, 98 U.S. 433, 438-9, where cases such as *The Siren*, 7 Wall. 152, 154, 159, were distinguished because the United States had instituted the action.

Furthermore, in the *Candelaria* case, title to the property was claimed by the Indian tribe, subject only to a restraint against alienation imposed by the Government. Hence, the title claimant was a formal party to the action pleaded as *res judicata*, and the United States was concluded from relitigating merely the tribe's title, not a claim of title of its own. Of course, in *Dollar v. Land* the defendants Land, et al., did not claim any title to the stock in themselves, and the United States in the quiet title action is litigating its own title, not any title claimed by Land.

In the *Drummond* case the United States was held not to be concluded by a prior action to which an Indian tribe was a party, although the Secretary of the Interior had authorized the tribe's employment of counsel and approved his fee. The statement there as to other circumstances under which the United States might be bound (citing only *Candelaria*, supra, where no question of sovereign immunity or a title claimed by the United States was involved) is not controlling in this type of case.

It is significant that the Supreme Court, in holding that *Dollar v. Land* would not be *res judicata* against the United States, cited the *Lee* case (which explicitly held that no officer of the Government could by defending a suit against its officers conclude the United

States by the judgment) rather than the *Candelaria* and *Drummond* cases. *Land v. Dollar*, 330 U.S. 731. See also *Goddard v. Frazier*, 156 F. 2d 938, 940 (C.C.A. 10), holding that the United States is not bound by prior litigation in which the Indian was represented by a Government attorney because he "represents the Indian, not the United States."

Cases such as *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, and *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F. 2d 82, 84 (C.A. 3), dealing with the binding effect of prior litigation between *private* parties are inapposite here since they involve no question of sovereign immunity. General principles as to the binding effect of a judgment must yield to the principle of sovereign immunity. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514-5.²⁰

Although Judge Murphy cited the *Restatement of Judgments*, § 84 (R. 293-4), he apparently overlooked the many provisions in that *Restatement* that the general principles there laid down as to the binding effect of judgments have no application where the prior judgment is sought to bind the sovereign. "The extent of the immunity of a sovereign is not within the scope of the Restatement of this Subject." *Restatement of Judgments*, § 5, Comment k (p. 35); § 32, Comment j (p. 132).²¹

²⁰ Of course, there is no such conflict of principles where Congress has consented to suit against the Government, as in *Jackson v. Irving Trust Co.*, 311 U.S. 494, 500.

²¹ § 5 k. "*Jurisdiction over a sovereign and its property.* The courts normally cannot exercise jurisdiction over a sovereign, do-

Other sections of the *Restatement of Judgments* explicitly provide that its rules are not applicable where, as here, the sovereign's officials are not empowered to waive immunity. §§ 9b (p. 53), 78d (p. 352), 85g (pp. 407-8). Thus, the *Restatement* explicitly recognizes and affirms the rule of the *Carr* and *Lee* cases that since the Attorney General has no authority to submit the United States to the courts' jurisdiction (except as Congress has consented), a judgment against its officers in a case like *Dollar v. Land* cannot estop the United States from litigating the issue of title in the quiet title suit here.²²

mestic or foreign, or over its property, without its consent. A judgment, whether in a proceeding in personam or in rem or quasi in rem, against a sovereign or its property rendered without its consent is void. So also, the persons and property of representatives of a foreign sovereign, such as ambassadors, are not subject to the jurisdiction of the court. The extent of such immunities is not within the scope of the Restatement of this subject."

§ 32 j. "*Property of a sovereign.* As a sovereign is not subject to the jurisdiction of the court unless it has consented to the exercise of jurisdiction over it, so the property of a sovereign is not subject to the jurisdiction of the court without its consent. Neither a proceeding in personam, nor a proceeding in rem or quasi in rem can be maintained against a State without its consent. Thus, if property is seized by an officer of the United States as property of an enemy alien, the owner of the property cannot maintain an action in personam or an action in rem or quasi in rem against the United States for the recovery of the property, unless by Act of Congress such a suit is permitted. So also, property of the United States or of a State or of a foreign sovereign cannot be reached by attachment without its consent. The extent of the immunity of a sovereign is not within the scope of the Restatement of this Subject."

²² Finally, the *Restatement of Judgments*, § 83 (p. 389) states: "A person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is *to the extent*

The limitation imposed by sovereign immunity upon the general principles of *res judicata* and collateral estoppel is likewise recognized in 1 Freeman, *Judgments* (5th ed. 1925), § 509 (p. 1098) :

The United States is not bound either by a judgment against a state officer who has no power to submit to the courts its title or rights, or by the judgment in an action against its own agent or officer unless it consented to being sued. This is true with respect to a judgment for possession of property held by the officer or agent as government property, and the action of its local district attorney in appearing for and defending the officer or agent sued, at the direction of the attorney general and secretary of the treasury, does not amount to such consent.

“Suits Against Government Officers and the Sovereign Immunity Doctrine”, 59 Harv. L. Rev. 1060, cited by Judge Murphy (R. 297), does not discuss at all the problem present here as to whether the United States can be estopped by the judgment in an action against its officers because the Attorney General represented such officers. That article deals with the circumstances in which an action against a Government officer may

stated in §§ 84-92 bound by and entitled to the benefits of the rules of res judicata.” [Italics supplied.]

Hence, the general provisions of the *Restatement*, §§ 83, 84, quoted by Judge Murphy are expressly qualified with respect to their application to the sovereign by § 85 (p. 408) which states:

“The rule stated in this Section applies only where there is authority or other power to bring or defend an action with reference to the particular subject matter in the controversy. * * * A public officer may or may not have power to bind the State or municipality in proceedings brought by or against him.”

be maintained without meeting the objection that it is an unconsented suit against the United States.²³

Finally *Cruise v. City and County of San Francisco*, 101 A.C.A. 613, cited by Judge Murphy (R. 299) may or may not correctly state the California law as to estoppel of municipal corporations. It certainly does not state the law as to the United States, for, as shown by the cases cited above, it is firmly established that the United States may not be estopped by the acts of its law officers in representing officials sued in their individual capacities.²⁴

²³ The author's conclusion is that such an action should be maintainable only when it is claimed that the defendant officer is acting pursuant to an unconstitutional statute or in excess of his statutory authority, but should not be maintainable when his act is merely an injury to the plaintiff. This conclusion foreshadows the result reached in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, which explains that *Land v. Dollar* is maintainable not on the premise that the Dollars had merely pledged the stock and were entitled to get it back upon payment of the debt, but on the basis of the allegations in the complaint that Land, et al. "acted in excess of their authority as public officers." 337 U.S. at 702, footnote 26.

²⁴ For additional authorities holding generally that the United States cannot be estopped by acts of its officers, see *Federal Crop Insurance Corp. v. Merrill*, 322 U.S. 380; *Wilber National Bank v. United States*, 294 U. S. 120, 123; *Royal Indemnity Co., v. United States*, 313 U.S. 289; *United States v. Stewart*, 311 U.S. 60, 70; *Utah et al. v. United States*, 284 U.S. 534, 545, 546; *Cramer et al. v. United States*, 261 U.S. 219, 234; *Jeems Bayou Fishing & Hunting Club et al. v. United States*, 260 U.S. 561, 564; *Utah Power & Light Company v. United States*, 243 U.S. 389, 408, 409; *Pine River Logging Company v. United States*, 186 U.S. 279, 291; *Filor v. United States*, 9 Wall. 45, 49; *Coleman v. United States*, 100 F. 2d 903 (C.A. 6); *Walter C. Reediger, Inc. v. United States*, 94 C. Cls. 120, 125.

5. The authorities relied on by appellees are likewise inapposite.

In the court below the Dollars relied on the following authorities and presumably will do so here. All of them are distinguishable.

Hill v. Wallace, 259 U.S. 44, did not involve any question as to whether the court's judgment would be binding upon the United States. The Solicitor General's appearance there on behalf of the United States was treated as an appearance *amicus curiae*. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, Congress had authorized the Bituminous Coal Commission to bind the United States.²⁵ In *Minnesota v. Hitchcock*, 185 U.S. 373, 388, and in *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273, 287-8, there was express legislation authorizing the maintenance of the suit against the sovereign. The position of the city in *New Orleans v. Gaines's Administrator*, 138 U.S. 595, 607, was no different from that of a private party (see *Lincoln County v. Luning*, 133 U.S. 529, 530; *Hopkins v. Clemson College*, 221 U.S. 636, 645) and consequently the *New Orleans* case involved no question of sovereign immunity.

The cases dealing with the institution of suits by the sovereign (*United States v. California*, 332 U.S. 19, 26-8) or its intervention in pending litigation (*Clark v. Barnard*, 108 U.S. 436, 447-8; *United States v. Bank of New York*, 296 U.S. 463, 480; *In re Read-York*, 152 F.2d 313 (C.A. 7)) are inapplicable since the United

²⁵ It is noteworthy that the *Sunshine* case reiterates the rule that a suit against a Government official in his individual capacity is not binding upon the United States. 310 U.S. at 403.

States never sought formally or informally to be made a party to the District of Columbia litigation.²⁶

Accordingly, Judge Murphy's holding that the United States is concluded by *Dollar v. Land* because the Department of Justice represented the defendants in that action is squarely in conflict with the controlling decisions of the Supreme Court and this Court. Indeed, it even conflicts with the decisions of the District of Columbia Court of Appeals upon which the Dollars rely.²⁷

²⁶ In *Land v. Dollar*, 188 F. 2d 629, 632 where the United States appeared specially without submitting itself to the jurisdiction of the district court, the District of Columbia Court of Appeals held that "the United States did not submit itself to the jurisdiction of the trial court."

²⁷ The fact that the United States is not bound by *Dollar v. Land* does not mean that the litigation was fruitless to the Dollars. They have obtained an adjudication of their right to possession of the stock as against the defendants in that action (subject, of course, to review by the Supreme Court on the pending petition for reconsideration of the denial of a writ of certiorari to review the merits), and that was all the Dollars had any right to expect under that form of litigation. Furthermore, the Dollars have obtained possession of the stock certificates and have prevented the United States from selling the stock. They have no reason to complain that they have not obtained control of the company through being able to vote the stock, since that is a prerogative of ownership, not mere possession of stock. *Pacific National Bank v. Eaton*, 141 U.S. 227, 233-4; *National Bank v. Watsonstown Bank*, 105 U.S. 217, 222.

More important, the result in *Dollar v. Land* has impelled the United States to submit its title to a judicial determination in the quiet title suit here, so that the conflicting claims between the Dollars and the United States will be finally resolved. Other persons with claims to property in the possession of the United States have been barred by sovereign immunity from obtaining any similar adjudications and relief. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682.

II

The District Court erred in disposing of the action by summary judgment.

Judge Murphy disregarded this Court's admonition against acting summarily in this litigation (*Dollar v. United States*, 190 F. 2d 547) in concluding that the case, in its posture before him, was appropriate for disposition by summary judgment. His reasoning seems confused, but apparently he went on the ground that there is no factual issue to try if (as he concluded was the case) the United States is estopped by the *Dollar v. Land* judgment. Thus Judge Murphy said: "But where the only conflict is as to what legal conclusions should be drawn from the undisputed facts, *or whether some rule of law precludes litigation* [i.e., "collateral estoppel"], a summary judgment generally lies" (R. 287) [Italics supplied].

The short answer is that, as we have shown above, Judge Murphy erred in his legal conclusion that the United States is estopped by *Dollar v. Land*. On the contrary, the United States is entitled to its own trial of the issue of title to the stock on such record as the parties may see fit to make in the quiet title suit.

Judge Murphy also used language to the effect that (collateral estoppel aside) the decision by the District of Columbia Court of Appeals of the title issue in favor of the Dollars in *Dollar v. Land* eliminated any dispute of fact on that issue and was sufficient ground for depriving the United States of a chance to prove in a trial here that it owns the stock (R. 287-90). In

other words, he thought that *stare decisis* has eliminated any substantial issue of fact here. That conclusion is likewise erroneous.

This problem should be approached from the standpoint expressed in the recent decisions by the Supreme Court that the use of summary judgment to shut off a full trial is to be sharply restricted. Thus in *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, which involved a course of litigation about as protracted and tortuous as that here, the Supreme Court reversed a summary judgment for the defendant, based, like Judge Murphy's order, on affidavits of interested persons and a stipulation, on the ground that the plaintiff should not be deprived of the right to cross-examine the defendant's witnesses.

In *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256, the Supreme Court held that where the case involved, as here, important issues as to the meaning of a complicated contract with a Government agency, dependent upon its practical construction by the parties and "reduction of the mass of conflicting contentions as to fact and inference from facts," summary judgment was inappropriate.

Likewise, in *Arenas v. United States*, 322 U.S. 419, 434, the Supreme Court reversed a summary judgment for the United States as defendant which, like the present case, was based on affidavits and the record made in another lawsuit, stating that the plaintiff was entitled to "a chance to establish his legal claim if he can by trial."

Again, in *Eccles v. Peoples Bank of Lakewood Vil-*

lage, 333 U.S. 426, 434, the Supreme Court reversed a summary judgment, stating: "Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment."

Furthermore, a party moving for summary judgment has the burden of establishing the non-existence of any genuine issue of fact and all doubts are resolved against him. *Walling v. Fairmont Creamery Co.*, 139 F. 2d 318, 322 (C.A. 8); *Wittlin v. Giacalone*, 154 F. 2d 20 (C.A. D.C.); *Dewey v. Clark*, 180 F. 2d 766, 772 (C.A. D.C.); *Traylor v. Black, Sivals & Bryson, Inc.*, 189 F. 2d 213, 216 (C.A. 8). The United States "has a right to a trial where there is the slightest doubt as to the facts." *Doehler Metal Furniture Co. v. United States*, 149 F. 2d 130, 135 (C.A. 2).

On this appeal this Court will give appellant the benefit of every doubt that the case was properly disposed of by summary judgment. *Walling v. Fairmont Creamery Co.*, *supra*; *Weisser v. Mursam Shoe Corporation*, 127 F. 2d 344, 346 (C.A. 2).

1. **The Dollar v. Land trial record and decision of the District of Columbia Court of Appeals thereon show the existence of a substantial issue of fact.**

The incomplete trial record printed for the District of Columbia Court of Appeals on the Dollars' appeal from the trial of *Dollar v. Land* on the merits, consisting of 2,142 pages,²⁸ was before Judge Murphy (R.

²⁸ This is not the complete trial record, but merely such portions

242-3, 250-1). He does not purport, however, to have made an independent examination of that record and to have formulated a conclusion of his own as to whether it presented substantial issues of fact, either as to the ultimate issue of whether the parties intended to transfer the stock in pledge or outright,²⁹ or as to the multitudinous "evidentiary facts" bearing on the ultimate issue of the parties' intent. Indeed Judge Murphy did not even mention in his opinion any of the evidence or facts relevant to those issues. His failure to do so emphasizes that he was really resting his decision on collateral estoppel.

If Judge Murphy had reached an independent conclusion, based on his analysis of the *Dollar v. Land* record, that the Dollars had merely pledged the stock, it would then be incumbent on this Court either to reverse on the ground that disputed issues of fact may not be resolved on motion for summary judgment (*Chappell v. Goltsman*, 186 F. 2d 215, 218 (C.A. 5)), or to review the correctness of such a decision. We are

thereof as counsel thought necessary to bring before the Court of Appeals on the issues deemed to be before that Court on that appeal.

²⁹ As this Court recently held, where, as here, the construction of a written instrument depends upon facts and circumstances illuminating the parties' intentions, the issue is one of fact. *Quon v. Niagara Fire Ins. Co.*, 190 F. 2d 257, 260-1 (C.A. 9). In *Copp v. Van Hise*, 119 F. 2d 691, 695 (C.A. 9), this Court said that the construction of a contract is a question of law "if the terms of the contract and the extrinsic facts which may affect its construction are free from dispute." As we show below, this is not such a case. See also *Gray Tool Co. v. Humble Oil & Refining Co.*, 186 F. 2d 365, 367 (C.A. 5), and *Morissette v. United States* — U.S. — (No. 12, Oct. Term, 1951, decided January 7, 1952), p. 28 of slip opinion.

confident of our ability to convince this Court at the proper time that the stock was transferred outright, not in pledge, but we do not believe this Court will undertake such an inquiry in the present posture of the case, without the benefit of any findings or conclusions on that issue by the court below. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256; *Winter Park Telephone Co. v. Southern Bell Tel. & Tel. Co.*, 181 F. 2d 341 (C.A. 5). "To do so here would be to convert an appellate court into a trial court * * * When the trial occurs before a judge without a jury, we have his findings of fact separated from his legal conclusions." *Arnstein v. Porter*, 154 F. 2d 464, 474 (C.A. 2); *Colby v. Klune*, 178 F. 2d 872, 874 (C.A. 2).

Judge Murphy was apparently misled by the wholly erroneous contention of the Dollars that the District of Columbia "Court of Appeals was compelled to reverse on the grounds that it [the record] contained no substantial evidence of absolute transfer" (R. 290).

Actually the very opinion of the District of Columbia Court of Appeals shows in itself that the record before it *did* present a substantial issue of fact as to whether the stock was transferred in pledge or outright. That Court first held it could disregard Rule 52(a), F.R.C.P., ignore the trial judge's findings that the transfer was one of outright title, and substitute its own. *Dollar v. Land*, 184 F. 2d 245, 248-9 (C.A. D.C.). It then discussed eight facts indicating that the stock was transferred outright and nine facts it thought indicated a pledge (184 F. 2d at 251-3). The Court of Appeals concluded:

There is no single decisive index to the nature of the 1938 contract. The answer to the problem depends upon the comparative evaluation of various indices, some pointing one way and some the other.

* * * * *

We are of opinion, upon balancing the conflicting considerations, that the transfer of the shares under the 1938 contract was a pledge. * * *
(184 F. 2d at 250, 253).

Obviously no court could rationally conclude that a record showing (1) that R. Stanley Dollar took a capital loss on the stock in his 1938 income tax return, stating he had transferred "all his right, title and interest" in the stock; (2) that although the San Francisco newspapers prominently carried a press release by the Maritime Commission that it was acquiring "absolute title" to the stock, the Dollars made no objection and thereafter transferred the stock although they were free to back out of the deal; (3) that Dollar of California after 1938 dropped the stock as an asset in its balance sheet; (4) that R. Stanley Dollar referred to himself as a "former owner"; and (5) that the Estate of J. Harold Dollar petitioned the California probate court for an order authorizing "sale" of the stock, did not raise a substantial issue of fact as to whether the stock was transferred outright. Since that record "certainly apprised the trial judge that there was relevant and important evidence which * * * appellant could and would tender on the trial," the granting of summary judgment was error. *Whitaker v. Coleman*, 115 F. 2d 305, 307 (C.A. 5). ³⁰

³⁰ Since the District of Columbia record discloses a substantial

Whether or not Judge Murphy was correct in his conclusion (R. 288-9) that the stipulation entered into in *Dollar v. Land* was before him on the motion for summary judgment³¹ is immaterial. For that stipulation, like the printed trial record, merely presented a mass of evidentiary data which could form the basis for conflicting inferences as to the ultimate fact issue of pledge or outright transfer. Indeed the stipulation shows that there is a substantial issue of fact present, not the contrary.

issue of fact, cases relied on by the Dollars sustaining summary judgment where there was no issue of fact, such as *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469 (C.A. 2); *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (E.D. Pa.), affirmed per curiam, 155 F. 2d 522; *McComb v. Southern Weighing & Inspection Bureau*, 170 F. 2d 526 (C.A. 4); *Chandler Laboratories v. Smith*, 88 F. Supp. 583 (E.D. Pa.); or where the moving party is entitled to judgment as a matter of law, such as *Suckow Borax Mines Consolidated v. Borax Consolidated*, 185 F. 2d 196 (C.A. 9); *Gifford v. Travelers Protective Ass'n.*, 153 F. 2d 209 (C.A. 9); *Egyes v. Magyar Nemzeti Bank*, 165 F. 2d 539 (C.A. 2), are beside the point.

³¹ The stipulation, 137 pages in length and incorporating hundreds of documents by reference, is Exhibit 1 to the Dollars' request for admissions of fact (see R. 242). *But none of the documents to which it refers were filed in the court below.* We trust that Judge Murphy did not attempt to draw conclusions as to the probative effect of documents he has never seen. Furthermore, the stipulation reserved objections of relevance and materiality to the data stated therein, was not evidence in the *Dollar v. Land* trial (except such particular parts thereof as were offered and received in evidence at the trial), and in certain respects permitted the parties to offer evidence contradicting it (Stip., pp. 1, 2).

Although the issue is not now material (see R. 309), we submit that appellant was justified in its refusal to admit that everything in the stipulation was true (R. 245-50) and hence that the stipulation was not properly before Judge Murphy. *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 92 F. Supp. 118 (S.D. Ia.).

How could a record which the District of Columbia Court of Appeals found presented a substantial issue of fact when it was before that court become a record not presenting a substantial issue of fact when before Judge Murphy? Obviously, only on the premise that the issue of fact was eliminated by the decision of the District of Columbia Court of Appeals. That premise is bad law; it elevates *stare decisis* to the conclusive effect of *res judicata*, by assuming that once a fact has been decided on conflicting evidence in a lawsuit between A and B, C in another lawsuit with A is to be denied even an opportunity to prove the truth to be otherwise.

This court has held that *stare decisis* does not have any such conclusive effect. *The Diamond Cement*, 95 F.2d 738, 742 (C.A. 9); *Quon v. Niagara Fire Ins. Co.*, 190 F.2d 257, 260 (C.A. 9); *Pacific American Fisheries, Inc. v. Mullaney*, 191 F.2d 137 (C.A. 9). *Stare decisis* is not to be used to prevent litigants (not bound by *res judicata*) from demonstrating that an earlier decision by another court is erroneous. *Helvering v. Hallock*, 309 U.S. 106, 119. See also *Commissioner of Internal Revenue v. City Nat. Bank & Trust Co.*, 142 F.2d 771, 772 (C.A. 10); *Reo Motors v. Commissioner of Internal Revenue*, 170 F.2d 1001, 1004 (C.A. 6), affirmed 338 U.S. 442).³² As stated in *Haberle Crystal Springs*

³² This is not a case such as *Vail v. Arizona*, 207 U. S. 201, where *stare decisis* was applied with special force because intervening rights of innocent third persons had arisen in reliance on the first decision.

And of course the United States never agreed to abide by the decision of the District of Columbia Court of Appeals in *Dollar v. Land*, as was the case in *Prout v. Starr*, 188 U.S. 537, 542.

Brewing Co. v. Clarke, 30 F.2d 219, 222 (C.A. 2):

Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an independent judgment in cases of first impression in our own court, and forbids us blindly to follow other circuits, when our minds are not persuaded by the arguments advanced.

Since the United States is not concluded by the *Dollar v. Land* litigation, it cannot be deprived by summary judgment of its right to try out here the issue as to whether or not the stock was transferred outright and to obtain the independent judgment of the courts of this circuit on that issue, merely because the District of Columbia Court of Appeals has reached an adverse conclusion in litigation between other parties. *Triplett v. Lowell*, 297 U.S. 638, 642, 644-5.

Indeed, on the motion for summary judgment the decision and record in *Dollar v. Land* was "entirely irrelevant." *Arnstein v. Porter*, 154 F.2d 464 (C.A. 2) was a suit for copyright infringement in which the defendant submitted depositions of plaintiff and himself and the records of five other infringement suits which plaintiff had lost. In reversing a summary judgment for defendant, the Court of Appeals said (pp. 474-5):

* * * Defendant asked the judge to take judicial notice of the record of another infringement suit in the same court, *Arnstein v. American Soc. of Composers*, D.C., 29 F.Supp. 388, involving the same issue as to the same composition, brought by plaintiff against another person, not in privity with the

defendant here, in which decision on that issue had been adverse to plaintiff. On that ground, the judge held that the present action, so far as based on "A Mother's Prayer," must be dismissed. In so holding, the judge erred. * * * The adjudication in the previous suit is entirely irrelevant.

* * * defendant asked the judge to take judicial notice of five previous copyright infringement actions, including the one just mentioned above, brought by the plaintiff in the same court against other persons, in which plaintiff had advanced some legal arguments like those he advances here, and in which he had been defeated. The judge in his opinion referred to but one of those suits, *Arnstein v. American Soc. of Composers*, and purported not to pass on the motion to dismiss for vexatiousness. But in his order for final judgment he specifically referred to the "record" of the court in the five cases, naming them, as constituting in part the basis of the judgment.

* * * * *

* * * we regard it as entirely improper to give any weight to other actions lost by plaintiff. Although, as stated above, the judge in his opinion, except as to one of the previous actions, did not say that he rested his decision on those other suits, the language of his final judgment order indicates that he was probably affected by them. If so, he erred. Absent the factors which make up *res judicata* (not present here), each case must stand on its own bottom, subject, of course, to the doctrine of *stare decisis*. Succumbing to the temptation to consider other defeats suffered by a party may lead a court astray; * * *.

Likewise, the District of Columbia Court of Appeals has no hesitation about refusing to follow a decision by a sister Court of Appeals in another suit between the *same* parties involving the same facts and legal issue, when it deems that decision erroneous. *Coplon v. United States*, 191 F.2d 749, 754-5 (C.A. D.C.).

This is not a case where all the "evidentiary facts" are undisputed and only the ultimate issue of the interpretation of the parties' intention as embodied in a written instrument remains in dispute. On the contrary credibility is definitely involved.³³ But even if there were no dispute on evidentiary facts, disposition by summary judgment would be inappropriate. As stated in *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 393-4 (C.A. 4), in reversing a summary judgment:

A number of questions arise, not only in connection with the breach of the contract, but also in connection with its proper interpretation and the damages recoverable for breach. These, however, should be decided in the light of the evidence which may be adduced upon a trial, not upon the affidavits

³³ For instance, the credibility of Mr. Dollar's testimony that he (who all his mature life has been a business executive dealing with enterprises of great financial magnitude and complexity) did not know the difference between a pledge of stock and a transfer of its ownership is certainly in issue (Ex. 2 to the Dollar request for admissions of fact, pp. 1176-7). And in *Dollar v. Land*, the Dollars attacked the credibility of the defendants' witness Laughlin, the counsel for the Maritime Commission in the stock transfer negotiations. Since credibility is in issue the case should not have been decided on motion for summary judgment. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 626-8; *Arnstein v. Porter*, 154 F. 2d 464, 469 (C.A. 2); *Colby v. Klune*, 178 F. 2d 872 (C.A. 2); *Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F. 2d 359 (C.A. 5).

presented on a motion to dismiss. * * * even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. The motion for summary judgment, * * * should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. * * * And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.

This Court took the same position in *Detsch & Co. v. American Products Co.*, 152 F.2d 743 (C.A. 9). See also *Winter Park Telephone Co. v. Southern Bell Tel. & Tel. Co.*, 181 F.2d 341 (C.A. 5), and *Paul E. Hawkins Co. v. Dennis*, 166 F.2d 61, 63 (C.A. 5), where contractual intent of the parties, deducible from inferences from undisputed facts, was involved.³⁴

2. It was error for the court below to deprive appellant of the opportunity to make a new record on trial of the issue of title to the stock.

Judge Murphy conceded that appellant's complaint is sufficient on its face (R. 304). But he said in effect: "I will not allow the United States to prove that it owns the stock because (1) it is barred by collateral estoppel; (2) the issue has been adversely adjudicated in *Dollar v. Land*; and (3) Dollar counsel assures me

³⁴ Although *Fox v. Johnson & Wimsatt*, 127 F. 2d 729 (C.A. D.C.) contains language indicating the contrary, the real ground of that decision is that the facts alleged by plaintiff were insufficient as a matter of law. In any event, the District of Columbia Court of Appeals in its more recent decisions now follows the controlling attitude of the Supreme Court in restricting the use of summary judgment. See *Vale v. Bonnett*, 191 F. 2d 334 (C.A. D.C.).

in his affidavit "that no additional fact of any substance could possibly be presented in this action" (R. 288). The first and second grounds have already been disposed of above. We show here that Judge Murphy's reliance on Mr. Lasky's affidavit was equally misplaced.

We submit that it is highly anomalous on its face for a court to bar a litigant from attempting to prove an admittedly well-pleaded cause of action because, forsooth, opposing counsel, who has a direct and most substantial pecuniary interest in the outcome,³⁵ affirms that his opponent will not be able to produce any new evidence upon trial. Obviously such an affidavit should be viewed with the greatest reserve, to put it mildly. *Walling v. Fairmont Creamery Co.*, 139 F. 2d 318, 322 (C.A. 8). Apart from the obvious elements of bias and the inevitable tendency of counsel to view their own cases through rose-colored glasses, a mere glance through the incomplete printed record on appeal in *Dollar v. Land* makes it apparent that in a case as complex as this, involving complicated negotiations extending over years, with dozens of persons involved in one way or another and hundreds of documents, it is literally impossible for an attorney, no matter how competent and thorough, to *know* that no new evidence can possibly be presented. Disposing of litigation as important as this on such an affidavit is indeed "apt to be treacherous." *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 434. See also *Arnstein v. Porter*, 154 F. 2d 464, 471 (C.A. 2), stating: "It will not do,

³⁵ Mr. Lasky admitted the obvious fact of his pecuniary interest in the litigation. Transcript of hearing of March 28, 1951, p. 80.

in such a case, to say that, since the plaintiff * * * has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true." On motion for summary judgment "even evidence which is uncontradicted is not necessarily to be accepted as true." *Kasper v. Baron*, 191 F. 2d 737, 738 (C.A. 8). Actually, as we show below, Mr. Lasky's affidavit was false, for appellant *does* have substantial new evidence to offer at the trial of this case.

Mr. Lasky's affidavit was, therefore, an insufficient basis for granting summary judgment. See *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624-8, and *Colby v. Klune*, 178 F. 2d 872, 873 (C.A. 2), stating: "The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility."³⁶ It is therefore of no significance that appellant did not file a counter-affidavit, particularly since the complaint, which alleged that the true intent of the transfer of the stock certificates was to vest full title in the United States and that the United States was the true owner of the stock, was verified. *Albert Dickinson Co. v. Mellos Peanut Co.*, 179 F. 2d 265, 267-9 (C.A. 7); *Griffith v. William Penn Broadcasting Co.*, 4 F.R.D. 475, 477 (E.D. Pa.); *United States v. Newbury Mfg. Co.*, 1 F.R.D. 718 (D. Mass.); *Kent v. Hanlin*, 35 F. Supp. 836 (E.D. Pa.), where, as here, the pleadings raised an issue as to the ownership of stock. " * * * a defendant may not by motion for

³⁶ Mr. Lasky's affirmation that no new evidence could possibly exist is not a statement of "such facts as would be admissible in evidence," and hence did not meet the specific requirement of Rule 56(e), F.R.C.P.

summary judgment and supporting affidavits force a plaintiff to try by affidavits material issues of his claim of which he is otherwise entitled to trial.” *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 216 (C.A. 8); *Chappell v. Goltsman*, 186 F. 2d 215, 218 (C.A. 5).

As this Court said in *Quon v. Niagara Fire Ins. Co.*, 190 F. 2d 757, 760 (C.A. 9):

But the judgment of fact of one court on a particular record cannot bind another court, or even the same court, to make a similar finding on a different record. The imponderables such as credibility and inferences crowd upon one judging of facts.

Furthermore it would have been wholly unreasonable to expect Government counsel to submit, within the brief time contemplated by summary judgment procedure, an affidavit of inordinate length detailing new proof to be adduced at the trial and the issues to which it would be relevant. Such an affidavit would be as difficult and time-consuming to prepare as preparation for trial itself. Even if such an affidavit could have been submitted, Judge Murphy could not have analyzed the 2,100-page printed record plus such an affidavit with anything like the assurance which would be possible for a judge to whom such evidence would be submitted in a trial.³⁷ “For how can the judge know, previous to trial, from reading paper testimony, what he will think of the testimony if and when, at a

³⁷ Significantly, the Dollars, in the presentation of their motion for summary judgment, made no effort whatever to inform Judge Murphy what facts the *Dollar v. Land* trial record demonstrates even from their point of view.

trial, he sees and hears the witnesses?" *Colby v. Klune*, 178 F. 2d 872, 874 (C.A. 2).

3. The United States does have new evidence to produce on the trial of this case.

At the time the motion for summary judgment was argued before Judge Murphy and continuing up to the present, the Federal Bureau of Investigation has been conducting a comprehensive investigation of the facts bearing on the title issue. Accordingly, Government counsel informed both Judge Harris, on the motion for preliminary injunction, and Judge Murphy, on the motion for summary judgment, that the Government is prepared to offer on the trial of the case new evidence (not introduced in *Dollar v. Land*) showing that the Dollars intended to transfer outright title to the stock (R. 146; Memorandum of the United States in opposition to the motion for summary judgment, p. 27).

The following is an abbreviated statement of new evidence, largely brought to light after the hearing before Judge Murphy, which appellant will offer at the trial (and which Mr. Lasky swore did not exist):

(a) That the second account of the executors of the J. Harold Dollar estate, filed on January 31, 1939, listed the disputed stock as "sold and accounted for herein"; and that the final account of distribution of assets of that estate did not include this stock.

(b) That in 1940 appellee Lorber, to justify the capital loss he took in his 1938 income tax return on the stock he transferred, had his bookkeeper, A. E. Lang, write the Bureau of Internal Revenue that the stock "was unconditionally turned over to the Maritime Com-

mission * * * Taxpayer lost all right, title and interest in this stock in 1938.”

(c) That Mortimer Fleishhacker, who transferred part of the stock in 1938 to the Commission and who was a predecessor in interest of R. Stanley Dollar as to certain shares of the stock, was allowed a capital loss he claimed only upon acceptance by the Bureau of Internal Revenue of his statement that he had surrendered all interest in the stock and a corroborating letter from the Maritime Commission that it received absolute title. That the same is true with respect to the tax return of the Dollar-Fleishhacker Trust.

(d) That Mortimer Fleishhacker in connection with his California State tax return submitted through his representative a statement to the tax authorities that “stock owned by the taxpayer was turned over to the Maritime Commission. The stock is still owned by the Commission.”

(e) That the Robert Dollar Company in its California State tax return for 1938 claimed a loss from sale or exchange of its stock because it was “necessary to dispose of its investment in Dollar Steamship Lines stock.”

(f) That although Sections 16 and 18 of the Delaware corporation law require that a transfer of shares as collateral shall be so stated in the stock transfer book and provide that the pledgor shall be entitled to vote the stock unless he, by entry on the corporation’s books, expressly authorizes the pledgee to vote, no such entry of pledge of this stock was made in American President Lines’ books, yet the Maritime Commission for years

voted the stock without any objection by the Dollars.

(g) That Keith R. Ferguson, executor of the J. Harold Dollar Estate and counsel for the Dollars at the closing of the stock transfer agreement, gave sworn testimony in the probate proceedings of that estate in Marin County, California, describing the disputed stock as that of "the steamship line we do not have any more."

(h) That H. Scott Dunham, who testified for the Dollars in the District Court of Columbia trial that a statement by him that the stock was "charged to income for the year 1938 upon the release to the United States Maritime Commission of the shares previously owned" really meant only that the stock was worthless, testified otherwise in the probate proceedings in Marin County, California, on February 23, 1939, that as a result of that same transaction "at the present time the estate has no stock."

(i) That contrary to the testimony of R. Stanley Dollar in the District of Columbia trial that he first learned on July 23, 1945, that American President Lines had discharged its 1938 debt to the Maritime Commission, the 1943 annual report to the stockholders of the American President Lines, of whom R. Stanley Dollar was one,³⁸ informed him that this debt had been entirely repaid.

(j) As new proof that the "pledge" theory of the Dollar defendants was first conceived about 1945, plaintiff will prove press publications in San Francisco and

³⁸ Mr. Dollar has throughout owned certain stock of American President Lines not involved in this litigation.

other cities of an offer by the Maritime Commission to sell this stock in 1943 and that the Dollar defendants made no protest of such proposed sale.

(k) That news articles in the San Francisco press stating acquisition of ownership by the United States of the stock in controversy appeared on August 21, August 23, September 7, September 20, September 27, September 28, October 5, October 10, October 11 and October 28, 1938. Plaintiff will examine the Dollar defendants to determine whether or not they, as regular readers of the San Francisco papers, did not read these news articles, although they made no protest at the time refuting the statements that the Government was acquiring ownership of the stock.

(l) That in audit reports of the Maritime Commission, some of which were transmitted to Congress, the transferred stock was shown as an asset of the Government.³⁹

³⁹ In this connection we shall show that the District of Columbia Court of Appeals was in error in the statements in its opinion on the contempt order as to the non-recognition of American President Lines as a corporation in which the United States has a proprietary interest. *Sawyer v. Dollar*, 190 F. 2d 623, 643 (C.A. D.C.). Contrary to the inexplicable statement of that court, Senate Document 227, 78th Cong., 2d sess., p. 21, *did* list American President Lines as a corporation in which the Government may have a proprietary interest and referred to the acquisition of the stock by the Commission. This was repeated in the General Accounting Office Reference Manual of Government Corporations as of June 30, 1945 (Sen. Doc. 86, 79th Cong., 1st sess.), pp. vii-xii, 1-2.

31 U.S.C. 856, which lists "mixed-ownership Government corporations," is confined to corporations which perform a governmental function, such as the federal land banks and the Federal Deposit Insurance Corporation. It does not include any of the 11 "corporations created privately or quasi privately in which the government may have a proprietary interest" listed in Senate

The United States plainly has the right to an independent judgment by the courts of this circuit on the issue of ownership of the stock, based on the new record which we will make on the trial of this action. See the authorities cited above and *Smith v. Hall*, 301 U.S. 216, 218, 233, where the Supreme Court, after having held a patent valid in the patentee's prior suit for infringement, reversed itself and held the patent invalid, on the basis of a different record made in the patentee's second suit for infringement. Judge Murphy's denial of the Government's right to make a new record was therefore error.

In conclusion, this case is one singularly inappropriate for summary judgment. It involves complex issues of public importance. See *Pacific American Fisheries, Inc. v. Mullaney*, 191 F. 2d 137, 141 (C.A. 9). A substantial issue of fact as to the intent of the stock transfer transaction is involved, as are questions of credibility of witnesses. The adverse decision in *Dollar v. Land* may not be used to deprive the United States of an opportunity to make a new record on trial, which it is prepared to do. The United States is entitled to have the independent judgment of the courts of this circuit as to the nature of the stock transfer.

Document 227, *supra*, of which American President Lines is one. Since American President Lines does not itself perform a governmental function, the fact that it is not listed in 31 U.S.C. 856 is no indication that Congress does not recognize that the Government owns this American President Lines stock.

CONCLUSION

The United States is not bound by the judgment in *Dollar v. Land*. It is entitled to its own trial of the issue of ownership of the stock in the action here, on a new record. It is entitled to the independent judgment of the courts of this circuit on that issue.

The summary judgment entered by Judge Murphy deprived the United States of those rights. It should, therefore, be reversed.

Respectfully submitted,

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No. 13,130

IN THE
United States
Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP
LINE, a Corporation; THE ROBERT DOLLAR
CO., a Corporation; H. M. LORBER,

Appellees.

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1938, pursuant to a certain agreement of August 15, 1938, they transferred that stock to the United States Maritime Commission.

In November 1945 appellees, as plaintiffs, filed suit in the United States District Court for the District of Columbia against the then members of the Maritime Commission, asserting that they were the owners of that stock (*Dollar, et al. v. Land, et al.*, No. 31468). The complaint alleged that the transfers of 1938 had been made solely as a pledge to secure a debt to the United States, and that the debt had been paid in 1943. It also alleged that the Maritime Commission had no authority in law to acquire outright title to the stock, and that its authority was limited to taking the stock as collateral. It further alleged that the defendants were wrongfully withholding the stock from the plaintiffs under the claim that outright ownership had been transferred to the United States by the 1938 transfers as the result of which the United States was the owner.

The District Court, of its own motion, dismissed the action as a suit against the United States. On appeal, the United States Court of Appeals for the District of Columbia reversed, *Dollar v. Land*, 154 F.2d 307. The Supreme Court granted certiorari and affirmed the Court of Appeals. *Land v. Dollar*, 330 U.S. 731. In affirming, the Supreme Court laid down the tests that would determine whether the United States acquired ownership of the shares or whether the Dollars are still the owners. The United States was not the owner and the Dollars were

“* * * if either of respondents’ [Dollars] contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.” (735, 736)*

Thereafter the case was tried, after filing of an answer alleging that the United States had acquired absolute ownership by the

*For the foregoing facts, R. 184, 185; admitted, R. 244, 251. These admissions incorporated by reference the opinions of the Court of Appeals and the Supreme Court.

1938 transfer. The District Court entered judgment for defendants, *Dollar v. Land*, 82 F. Supp. 919. An appeal was taken to the Court of Appeals for the District of Columbia Circuit. That court not only reversed, but it directed entry of judgment for the plaintiffs. *It said that no court of equity could possibly hold that the transaction had been anything but a pledge, Dollar v. Land*, 184 F.2d 245 (July 1950). It held that the transfers of 1938 were a pledge only, and that the United States had never become owner.

The Department of Justice had conducted the litigation on behalf of the defendants, and it immediately petitioned the Supreme Court for certiorari. The Supreme Court denied certiorari in November, 1950. *Land v. Dollar*, 340 U.S. 884.

Judgment was entered for the plaintiffs (appellees here) in December 1950. Thereafter the Department of Justice again conducted appeals, unsuccessfully. *Land v. Dollar*, 188 F.2d 629. The Court of Appeals repeated that it had adjudicated that the transaction was a pledge and that the United States had never acquired ownership.*

Once again the Department of Justice petitioned for certiorari, and certiorari was once again denied, March 12, 1951. *Land v. Dollar*, 340 U.S. 948. Concurrently the Department of Justice petitioned for reconsideration of the earlier denial of certiorari, and that too was denied on March 12th. 340 U.S. 948.

Once again mandate went down, and judgment was entered for plaintiffs on March 16, 1951 (R. 198, 244, 251). Thereafter, contempt proceedings were instituted in the Court of Appeals for the District of Columbia Circuit, and that court issued two opinions which will be referred to from time to time in this brief, one on April 11, 1951, when it issued its orders to show cause, *Land v. Dollar*, 190 F.2d 366, and one on May 18, 1951, when it decided the contempt proceedings, *Land v. Dollar, Sawyer v. Dollar*, 190 F.2d 623. In its Findings and Conclusions of May 18, it said (190 F.2d at 632):

*For the foregoing facts, R. 185, 187; admitted R. 244, 252, 253. The opinion of the Court of Appeals is incorporated by reference.

"The suit filed by the Dollar interests to recover possession of the shares of stock in question, which the members of the Maritime Commission held under the claim that they were owned by the United States, presented two basic justiciable issues. *Those issues were whether the United States owned the shares*, and whether the Dollar interests were entitled to possession; and *the answer to the latter depended upon the answer to the former.*

"Our decision of July 17, 1950, with respect to which certiorari was denied by the Supreme Court, *was that the shares were not owned by the United States * * *.*"*

2. THE PRESENT SUIT.

Dollar v. Land came to a final decree at the end of 51½ years of litigation, reaching the Court of Appeals 3 times and the Supreme Court 4 times. Then, on March 12, 1951, following denial on that very day by the Supreme Court of the petitions for certiorari and for reconsideration of the previous denial, the Department of Justice filed the complaint in the present suit in the District Court for the Northern District of California.

The subject matter is exactly the same as in the District of Columbia litigation, which we shall hereafter for convenience refer to as *Dollar v. Land*. The named plaintiff is the "United States", as such; the defendants are the successful plaintiffs in *Dollar v. Land*.†

The complaint sought to quiet title to the identical shares of stock involved in that litigation. The basis on which it predicated title is the identical 1938 transfer based on the identical agreement of August, 1938, involved in *Dollar v. Land*. The issue raised is the identical issue there presented and decided, i.e., whether the 1938 transfer constituted an outright transfer of

*Certiorari from the adjudication of contempt was granted November 13, 1951.

†There are other defendants, joined so that they may be subjected to an injunction against transferring the stock to appellees. They are American President Lines, its stock transfer agent, its registrar and its secretary. These defendants are not concerned in the main issue in the case.

ownership or a mere pledge to secure a debt. If the latter, judgment for the defendants was required.

This suit is an effort to relitigate *Dollar v. Land* out of sheer disgruntlement with the decision there reached.* This is revealed in plaintiff's motion for preliminary injunction filed a week after the complaint. It is there asserted that the decision of the Court of Appeals for the District of Columbia was a "serious miscarriage of justice" and "for that reason" the Department of Justice "has declined * * * to acquiesce in it" (R. 63).†

As the Court of Appeals for the District of Columbia said about the present suit in May, 1951, "the new litigation pictured to us in these papers involves no new law, person or circumstance" (*Land v. Dollar*, 190 F.2d 623, 646).

3. THE MOTION FOR JUDGMENT.

On May 15, 1951, defendants (appellees) filed their answer (R. 174-197). On the same day they filed a Request for Admissions of Fact under Rule 36, R.C.P. (R. 242).

On May 22nd they filed a motion to dismiss under Rule 12(b), a motion for judgment on the pleadings under Rule 12(c), and a motion for summary judgment under Rule 56 (R. 257). The motion specified that it was based on certain data, including the deposition of a government counsel, an affidavit of Moses Lasky, one of appellees' attorneys, and primarily "all admissions made in response to these defendants' Request for Admissions of Fact" (R. 260).

Plaintiff (appellant) offered no affidavits in opposition. It neither made nor tendered any contrary showing whatever. In its

*If the Supreme Court had granted certiorari on March 12th, the complaint would not have been filed. The Department of Justice had sent an attorney beforehand to San Francisco, and, certiorari being denied, upon telephone instructions the complaint was filed within a matter of hours (R. 97-101).

†The same statement was made in the argument on that motion (R. 70). It was made again in the return filed on April 23, 1951 in the Court of Appeals for the District of Columbia Circuit in answering the contempt charges (R. 281).

present brief it asserts (pp. 49-52) that it has certain additional evidence. But no such showing was made in the court below as required by R.C.P. Rule 56. *The motion for summary judgment was submitted on the record made by appellees.**

The motion was briefed and argued in June 1951. On October 3, 1951 it was granted, and judgment was entered quieting title in appellees (R. 282-306).

From this judgment the appeal has been taken.

4. SUMMARY STATEMENT OF THE THREE PRINCIPAL GROUNDS OF THE MOTION FOR JUDGMENT.

The motion was made under the procedure succinctly described in 3 Barron and Holtzoff, Federal Practice and Procedure, Rules edition, pp. 107, 108.† And it was made on six grounds (R. 275), but the principal ones may be summarized thus:

1. The suit involves the same transaction as *Dollar v. Land* and the same issue whether certain transfers of shares in 1938 to the United States Maritime Commission were in pledge or a sale. The record on which *Dollar v. Land* had been adjudicated was introduced in support of the motion, and the truth of all matters therein proved was established in appropriate manners as by requests for admissions of fact, and no showing whatever was made in opposition (R. 259, 242, 126-130). As the District Court said, "In response to this showing the Government has done nothing" (R. 288). There was thus no genuine issue of fact, and the undisputed facts establish that the transfers were by way of pledge.

*Nevertheless, at pp. 91-96, *infra*, we show the complete emptiness of the alleged new evidence.

†"Thus a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted and may show that, even if the complaint is sufficient in this respect, undisputed facts not appearing in the complaint entitle him to a summary judgment in his favor. * * * Motions to dismiss and for summary judgment may be considered together.

"* * * Motions for judgment on the pleadings and for summary judgment may be considered together, and where both are made they need not be treated separately as if the first dealt only with issues of law on the pleadings and the second only with issues of fact."

On precisely the same facts a United States Court of Appeals had held that no conclusion was possible other than that the transfers were in pledge. That decision, as a matter of authority or *stare decisis*—apart from any question of *res judicata* or collateral estoppel—showed that there was no genuine issue of fact.

2. The adjudication in *Dollar v. Land* that the 1938 transfers were in pledge is conclusive on the plaintiff because of facts occurring after the Supreme Court's decision in April 1947 in *Land v. Dollar*, 330 U.S. 731. Up to that point the Department of Justice had been in the cause only to protest against the exercise of jurisdiction. Being overruled on that protest, the Attorney General had a choice to step out of the litigation or, deciding that the interests of the United States were better served by handling the case on the merits, to stay in. He chose the latter. He and those acting under his supervision handled the case at all subsequent stages, in the name of defendants, but on behalf of the United States, asserting that they were doing so as government counsel and that the United States was the real party in interest. Throughout the subsequent course of the litigation they completely took over, controlled and handled the case against the Dollars to the entire exclusion of anyone else, doing so at the expense of the Treasury, for the benefit of the United States, and for it as the real party in interest. In the words of *Drummond v. United States*, 324 U.S. 316, 318, the United States, though not formally a party, took the laboring oar in the controversy.

3. In *Land v. Dollar*, 330 U.S. 731, the Supreme Court ruled that if the Commission had no authority to purchase the shares or acquire them outright, the United States never acquired title. Here the complaint rests the United States' claim of title on the identical transfers, and so on the face of the complaint the identical issue is presented. That is purely an issue of law. The Maritime Commission did not have the authority, and therefore the complaint shows on its face that the United States acquired no title.

B. The Record on Which the Motion for Judgment Was Based and Decided.

Appellant's brief shows a complete misconception of the record on which the motion for judgment was made and decided.

The third ground of the motion required no extrinsic showing. It turns on a pure question of law appearing on the face of the complaint itself.

The other two grounds required a showing outside of the complaint:

RECORD ON DEFENSE OF COLLATERAL ESTOPPEL

The defense that appellant was barred on principles of collateral estoppel required, of course, a showing of the judgment entered in the District of Columbia litigation. That judgment was established by allegations of appellant's own complaint (R. 6, 7), admitted by the answer (R. 177) and by response to request for admission No. 4 (R. 244, 251, 198).*

If the "United States" had been a party *eo nomine* to the District of Columbia litigation, it would have been unnecessary to do more than establish the judgment, which would be binding as a matter of *res judicata*. Since the United States was not a party *eo nomine*, it was necessary to go further—to show the presence of certain additional but undisputed facts. These are detailed at length at pp. 13-17, *infra*, summarized at p. 7 above, and may for convenience be described as the fact that the United States conducted the District of Columbia litigation for its own interests.

These facts were established thus:

(a) The record in the District of Columbia litigation was introduced. Attached to the request for admissions of fact was a certified copy of the Joint Appendix to the briefs in the Court of Appeals for the District of Columbia on the appeal which resulted

*Copy of the judgment of the Court of Appeals of January 31, 1951 was attached to the complaint as Exhibit B. Printing of this exhibit was dispensed with by order of this Court.

in judgment for appellees in July 1950 (Request 2, R. 242).^{*} In response appellant admitted that this was the record up to that date (R. 250). The subsequent proceedings in the District of Columbia litigation up to January 31, 1951, appear in two transcripts in the Supreme Court, identified in the answer (R. 189) and admitted in response to request for admission No. 3 (R. 244, 251). The later occurrences are covered by the allegations of the answer (R. 189, 190; admitted R. 254 in response to requests 5(f) and (g), R. 244).[†]

In response to Requests for Admission appellant admitted that everything shown by these records to have happened in the litigation did happen (Requests 2c, 3, R. 243, 244, 251).

These records, so authenticated and received below in support of the motion, show how the District of Columbia litigation was conducted, the part played by the Department of Justice, and the issues litigated and decided.

(b) The reporter's daily transcript of the trial in *Dollar v. Land* contained many arguments and statements of counsel showing the position played by the Department of Justice in the conduct of the litigation. Many of these were omitted by mutual agreement from the Joint Appendix referred to above because not relevant to the issues then to be decided. These were brought before the court below by affidavit of Moses Lasky in support of the motion for summary judgment (R. 264-275).[‡] In perform-

^{*}Under the rules of that court the record is not printed but the parties print in a Joint Appendix to their briefs all the record deemed material. The Joint Appendix is thus the same as the record printed under the rules of this Court, except that it is printed by the parties and not the Clerk.

[†]The response to Request 5g denied that a certain exhibit was a true copy of an order entered by the District Court for the District of Columbia on March 16, 1951. But on hearing of the motion for summary judgment a certified copy of the order was offered and received (R. 129, 319, 200).

[‡]Thus the affidavit recited (R. 264):

"At all times during said trial I was associated with Gregory A. Harrison, Esq., as one of the attorneys for the plaintiffs in that action, and, as such, was present in court during the entire trial. I have in my possession a daily transcript of the trial by the official

ing that function the *affidavit tendered no disputed facts*. It merely served as a vehicle to quote from the official transcript, and the passages so laid before the court below are not and never have been disputed by appellant here.

(c) Other facts concerning the part played by the Department of Justice were laid before the court by other requests for admissions and responses thereto (Request 5(e), (h) to (l), inc., R. 244, 253-255, 188, 190, 191).

Obviously, the foregoing showing was admissible in support of the claim of collateral estoppel. The record in another cause is always admissible to ascertain the subject matter of the controversy and the scope of the thing adjudged. *Washington Gas Co. v. District of Columbia*, 161 U.S. 316, 329; *Standard Surety & Cas. Co. v. Standard Accident Insurance Co.*, 104 F.2d 492, 496, fn. 1 (8 Cir.). And if facts in addition to a judgment itself are pertinent to show that it is binding on a party in a subsequent litigation, they may be proved. If the record of the prior litigation shows those facts, and is admitted to correctly state them, naturally it is admissible for the purpose.

RECORD ON DEFENSE OF NO GENUINE ISSUE

Appellant is particularly confused as to the nature of the showing in support of the motion for judgment, as respects the first ground of the motion summarized above, namely, that even apart from any question of collateral estoppel no genuine issue of fact exists.

Appellant objects that the record in *Dollar v. Land* was not admissible here. What it overlooks is that appellees did not merely

court reporter, Thomas O'Neal, certified by him, and all quotations below are from that transcript. The whole of the transcript will be produced in court at the hearing of the motion for summary judgment, if the authenticity of any of the quotations is denied. Plaintiff already has a copy of the transcript. Furthermore, I personally heard all said remarks made."

An identical procedure for bringing facts before the court on motion for summary judgment was followed and approved by this Court in *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196 at 202, 2d col.

prove the record, they also proved the facts disclosed, i.e., the facts established in the District of Columbia litigation.*

The vast bulk of the evidence and all the important controlling facts in *Dollar v. Land* were stipulated. Attached to the Request for Admissions of Fact here, as Exhibit 1, was a certified copy of the Stipulation of Facts entered into in that case. By Request No. 1 the Department of Justice was asked to admit that every matter which in that case it had stipulated to be true is still true (R. 242). Plaintiff gave that admission (see pp. 12, 13, *infra*). Thus it was a stipulated fact on the motion for summary judgment, not merely that the stipulation had been entered into in the District of Columbia litigation, but that the facts there stipulated are facts here.†

Moreover, although oral evidence played a minor part in the case, it was admitted, in response to Request 2(d) (R. 243, 251), that all witnesses shown by the Joint Appendix to have testified at

*Appellant's brief (pp. 42, et seq.) cites *Arnstein v. Porter*, 154 F.2d 464. That case is not in point. There defendant filed a novel motion to dismiss a copyright infringement suit as vexatious, relied on the fact that the plaintiff had lost similar suits against other people, and asked the court to take judicial notice of the records in the other cases. Here appellees *proved* the record in *Dollar v. Land* and in addition independently proved the facts which had been proved in that case. Compare *Leishman v. Radio Condenser Co.*, 167 F.2d 890 (9 Cir.), *cer. den.* 335 U.S. 891, discussed at p. 66, *infra*.

†Appellant argues (fn. 31, p. 40) that Exhibit 1 attached to the Request did not have attached to it the various documents which the stipulation identifies and authenticates. Appellant overlooks the simple mechanics by which the facts were established below. That stipulation had not been placed in evidence in *Dollar v. Land*, en masse, but counsel placed in evidence such of the stipulated facts and documents as were material. And these matters appear in the Joint Appendix.

In response to Requests for Admission appellant admitted (R. 243, 251, 309) that the Joint Appendix truly sets forth all matters which it purports to state (Request No. 2(c), that wherever any exhibit identified therein as one of the documents authenticated in the Stipulation of Facts is set forth in full, it is a true copy of the document (Request 2(e)), and wherever any exhibit identified therein as one of the documents authenticated in the stipulation is partially set forth, the portion so set forth is correctly stated and the portion omitted is not material (Request 2(f)).

the trial in the District of Columbia litigation were first duly sworn and having been sworn testified as said Joint Appendix shows. Thus the sworn testimony of these witnesses was before the court in support of the motion, as fully as if restated in affidavits. In fact, the situation is much stronger. It is exactly as if depositions of these witnesses had been taken in this cause and offered in support of the motion, because their statements are not *ex parte*; the testimony was given subject to cross-examination, and the examination, direct and cross, *was by the very same counsel who appear in this case for the parties here.*

Thus in support of the motion for summary judgment appellees did not merely prove what record was before the District of Columbia courts. *They proved, by admission, the facts on which it must be determined whether the 1938 transfers were a pledge.*

And in opposition appellant here offered no additional or contrary showing.

In the whole history of summary judgment procedure never has there been a more perfect or ideal foundation for a summary judgment. Here was no battle of affidavits. This case was unique. *There has been laid before the court a complete body of facts, admittedly undisputed, which are the very facts on which precisely the same issue was decided by a United States Court of Appeals, whose decision the Supreme Court declined to review.*

The consequences that flow from that showing we discuss at pages 61-96, *infra*.

THE FACTS WHICH APPELLANT WAS REQUESTED TO ADMIT WERE ADMITTED

In response to some of the requests for admissions of fact, appellant's original statement fenced (see R. 246, *et seq.*), but made no denial. Under Rule 36, R.C.P. that response was an admission (cf. R. 289). We need not heap up authorities on that matter now; it is no longer controversial, or as appellant concedes in its brief (p. 40, fn. 31) "not now material," because later in the District Court plaintiff-appellant filed in writing the following admission (R. 309):

"Hence plaintiff can now state that the matters stated in said stipulation to be facts are such, that the exhibits attached to said stipulation are true copies of the documents they purport to be, and that the Joint Appendix printed for the District of Columbia Court of Appeals in *Dollar v. Land* correctly sets forth the exhibits, or parts thereof, which it purports to do and that the portions of exhibits omitted from the Joint Appendix were then considered for the purpose of the appeal for which said Joint Appendix was prepared, to be not relevant."

C. The Government Conducted the District of Columbia Litigation and Did So for Its Own Benefit and at Its Expense.

At all times after the decision of the United States Supreme Court on April 7, 1947, the Attorney General of the United States and the Department of Justice under his supervision handled the litigation in *Dollar v. Land*.^{*} From first to last, he controlled the case, he did so for the United States, at its expense, and for its interests. The record defendants were treated by him as mere names, which he used for his purposes. In reality, the nominal defendants had nothing whatever to do with the case.

He and they appeared for and in the name of the defendants, filed the answer in their name, filed and executed all stipulations in the cause, including stipulations covering evidence, prepared and tried the case, handled it on the several appeals and the several proceedings in the United States Supreme Court in the names of the defendants and of Charles Sawyer, Secretary of Commerce, and in the name of the United States. All acts whatsoever performed, done or committed at every stage of the proceedings in the name of the defendants were handled by the Attorney General and the Department of Justice. They completely took over the case in opposition to plaintiffs and controlled and handled it to the complete exclusion of anyone else. They sought an adjudication that the agreement of August 15, 1938 and the transfers made pursuant thereto on or about October 26, 1938 were not a

^{*}They also did so prior to that decision, but what occurred before then is irrelevant, as we note at pp. 20, 21, 31-34, *infra*.

pledge but an outright transfer of title and ownership to the United States, and that the United States thereby became, was and is the owner of said shares. All this was done for the benefit of the United States, and for it as the real party in interest. And it was so conducted to the knowledge of the courts and of all parties to the cause.

Moreover, the litigation was conducted at the expense of the Treasury of the United States. Appellees' answer in the instant case alleged (R. 191):

"Throughout said litigation from first to last the defense was conducted at the expense of the Treasury of the United States."

In Request for Admission No. 5(k) appellant was called on to admit this statement (R. 244) and it did so (R. 255).

From first to last the Department of Justice asserted that it was handling the case as the government. Beginning with their opening statement at the trial and concluding with their closing argument, the attorneys for the Department of Justice who handled the case so referred to themselves. These passages are too meaty to quote here in full; we refer to the record (see R. 265-275). Suffice it to note that *these attorneys expressly told the court* that while their clients "technically are certain individuals", *their real client was "The United States of America"* (R. 268)* *and that "the Government is the real party in interest"* (R. 267).†

*"The Court: Let me ask you this: Who is the client here?"

"Mr. Siegel: The clients technically are certain individuals."

"The Court: *Who is the client?*"

"Mr. Siegel: *The United States of America*, if the Court please."

†"I may say, Your Honor, in taking the view that the Government is the real party in interest, we have in truth allowed or waived, in effect, a limitation upon the evidence which would be perfectly permissible. If, for example, this action is in truth an action taken only against the individuals concerned, then clearly the evidence which is being offered as admissions could not be admissible against any of the defendants except those who were defendants who make the admissions, or their successors in interest; and succeeding members on the Commission would in no sense be successors in interest to their predecessors on the Commission."

"I have, however, made no such limitation and do not want to put any such technical limitation on the proof, though I could clearly on their theory of the action."

Appellant tries to minimize these statements by saying that counsel spoke from force of habit (Br. 24). No such explanation holds water.

We are dealing with *realities*, not fictions. The reality is disclosed by a brief filed on behalf of the Secretary of Commerce, Mr. Sawyer, in January 1952, in the United States Supreme Court in *Sawyer v. Dollar*, No. 247, October Term, 1951—the contempt proceedings referred to at page 3, *supra*. We adopt the statement as our own. Speaking of *Dollar v. Land* Mr. Sawyer states (p. 34):

“The Department of Justice as the primary litigating branch of the government handles Government suits upon its own responsibility and, in the light of the size and complexity of the executive branch, of necessity with relatively little direct consultation with department heads who are nominal parties. The result is that the head of a department who is a party to a suit does not have the control and usually does not have the familiarity possessed by an ordinary private litigant. He relies practically as well as legally upon the advice of the Attorney General.

“These statements are sharply illustrated by the present case. The controversy concerned the legal effect of an agreement made many years previously by a predecessor agency. Petitioner had only recently succeeded to the functions of that agency, and at a time when this case had been in the courts for several years under the direction of the Department of Justice. Although generally aware of this litigation he had had no personal participation in it. * * * he was in the hands of the Attorney General.”

The trial court itself in *Dollar v. Land* often referred to the defendants as the “government”. These references were not casual: for example, in its order settling the findings on March 21, 1949, that court recited “*Government* counsel has submitted fifty-one findings of fact * * *” (J. A. 276).

Mr. MacGuineas, an attorney in the Department of Justice, one of the appellants’ attorneys and one of the attorneys for the defendants in *Dollar v. Land*, testified here. He said that he

acted as counsel in *Dollar v. Land* "in [his] capacity of attorney in the Department of Justice", that as such he assisted another attorney in the Department in the trial, wrote the briefs and argued the cause orally in the Court of Appeals on the merits. As such he and his superiors in the Department represented the defendants after the mandate went down, both in the trial court and again on the subsequent appeals, appearing also for the Secretary of Commerce and the United States. As such he prepared the first draft of a petition for certiorari in the United States Supreme Court, the final draft being prepared and filed by the Solicitor General of the United States. He testified that in all this activity he acted under official assignment from his superiors in the Department of Justice.

Asked whether he "acted * * * as attorney in the Department of Justice of the United States," he replied: "Entirely, I have never acted—I have never done anything in connection with that litigation except in my official capacity as an attorney in the Department of Justice pursuant to instructions from my superior officers" (R. 84-92).

And in the court below, in describing the case of *Dollar v. Land*, he said:

"Much evidence was adduced by both sides of surrounding circumstances with respect to this transaction, the *Government*, of course, asserting that it was an outright transfer of absolute title and the defendants [i.e., defendants in the instant case] asserting that it was merely a pledge"* (R. 69).

Another striking fact is this: On June 10, 1947, after the Supreme Court held that the action could be maintained (*Land v. Dollar*, 330 U.S. 731) and after the mandate went down, appellees (plaintiffs there) and the Attorney General acting through Assistant Attorney General Peyton Ford, stipulated that neither

*The same counsel also said (R. 73, 74):

"We have taken two appeals to the Court of Appeals" and "I was present at the trial of that case, Your Honor. Do you want to know also about the *Government's* appeals?"

the shares of stock nor the certificates representing them would be sold, transferred or otherwise disposed of until final determination of the cause, and on June 11, 1945, the court so ordered. (J. A. 53; R. 195-244 (Request 6), 256).

These are the facts. Their significance we discuss below (see pp. 18-61, *infra*).

Argument

Under the test laid down by the Supreme Court, there are two main issues (p. 2, *supra*):

1. Did the Maritime Commission have authority to purchase the shares or acquire them outright?

2. Even if it did, were the 1938 transfers in pledge or a sale?

The District Court, in granting the motion for judgment, did not answer the first question. Nevertheless, if the Commission did not have the requisite authority, the United States never acquired title, *Land v. Dollar*, 330 U.S. 731, and the judgment quieting appellees' title is correct. If correct on that ground, it must be affirmed although the District Court acted on other grounds. *Helvering v. Gowran*, 302 U.S. 238, 245; *Le Tulle v. Scofield*, 308 U.S. 415.

The District Court held that the transfers were a pledge. It rested on two grounds, each independently sufficient. As it said in its opinion (R. 289):

"The Dollar defendants have made an affirmative showing that the issues in this case are the same as those which were before the courts in the District of Columbia and have heretofore been adjudicated. Defendants argue that plaintiff is concluded as to the issues there decided. Or, alternatively, if the Government is not estopped that the case is before us on the identical record upon which the Court of Appeals was compelled to reverse on the grounds that it contained no substantial evidence of absolute transfer. *A fortiori*, no genuine issue of fact is here presented and a summary judgment must be entered for defendants."

We shall discuss these two grounds and shall then discuss the issue of statutory authority.

I.

APPELLANT IS BOUND BY THE DISTRICT OF COLUMBIA JUDGMENT ON PRINCIPLES OF COLLATERAL ESTOPPEL.

A. Preliminary.

As said in *Stoll v. Gottlieb*, 305 U.S. 165, 172, "it is just as important that there should be a place to end as that there should be a place to begin litigation".

The issue whether the transfers were in pledge has been tried, has been decided, and it has been held that the transfers were in pledge only. That trial was long, the record exhaustive.

The January 1952 issue of the Harvard Law Review (Vol. 65, No. 3) contains a detailed review of the Dollar litigation and discusses the question of "collateral estoppel against the United States" (pp. 476-478). The review concludes that the judgment here on appeal is correct. The article states (477):

"* * * the Government should be bound by the decision of the District of Columbia court on the issues there considered. And since the Government raised no new issues in the California proceeding, the court there properly awarded summary judgment to Dollar. To have held otherwise, in the words of that court, 'would be to enlarge the rather grotesque spectacle of the government which has refused to submit to the rulings of its own courts, and to fix a pattern in future litigation of similar character which would not only make confusion twice confounded, but would tend to destroy the law to which men have given their confidence and their honest respect.'"

If the United States, *eo nomine*, had been a party to the District of Columbia litigation, the judgment would be binding on it under principles of *res judicata*. Yet, had it appeared in its own name it would have been represented by no different attorneys than those who in fact tried the case, the case would have been handled and controlled in identically the same way as it was, the

record would have been the same, the same pocketbook would have paid the bills!

What is involved is a basic principle of justice and morals. As said in *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F.2d 82, 84 (3 Cir.):

"* * * The general principle back of the rules of *res judicata* has received recent and clear statement by the Supreme Court. '*Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.*' * * * A litigant is to have his day in court, but only one day in court, against another."*

Modern law applies these principles to situations where a litigant was not a party of record in the first cause. In such a case it may not apply *res judicata* but rather what is known as "collateral estoppel". *Res judicata* operates as a merger or bar of all claims that could have been asserted and litigated, and the litigant is not only bound by what is actually raised and decided, but he is precluded from later raising any issue that would have affected the result (cf. *In re Chiles*, 89 U.S. 157). Under *collateral estoppel* one is at least bound by the determination of an issue of law or fact actually litigated and decided.

Here the issue litigated in *Dollar v. Land* was the nature of the transfer of October 1938 made pursuant to the agreement of August 15, 1938. If the United States was a party, *eo nomine*, to the District of Columbia litigation, it can assert no basis of title whatever now. If it was not a party of record to the District of Columbia litigation, it would be free to assert that it acquired title to the shares in some other way or by some other transaction than the transfers of October 1938 made pursuant to the agreement of August 15, 1938, but under principles of collateral estop-

*It is a "generally accepted precept that a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time." *Bruszewski v. United States*, 181 F.2d 419, cer. den. 340 U.S. 865.

pel the United States is conclusively bound by the determination of the nature of that transfer.

These distinctions are stated in the cases cited in appellant's brief (pp. 13-14, fn. 9).

The question of *res judicata*, i.e., merger or bar, need not be considered in this case because the complaint affirmatively alleges that title was in the appellees or their predecessors and bases its alleged title solely on the claim that the United States derived title from them by the 1938 transfer. And that precise issue was the very core of *Dollar v. Land*.*

As said in 65 Harvard Law Review 477:

"A distinction can validly be drawn here between applying merger or bar to the Government and applying collateral estoppel. In the latter case, if the Government presents new issues it may be heard. Absent such untried issues, the Government should not have a second day in court, a privilege denied to the private litigant. * * * If the private litigant must cope with the powerful litigation forces of the United States, he should derive some benefit from his effort."

**THE CONTROLLING FACT:—THE CONDUCT OF DOLLAR V. LAND
AFTER THE DECISION OF THE JURISDICTIONAL ISSUE**

As we shall see, the chief basis for appellant's contention that the judgment in *Dollar v. Land* does not conclude it is the statement made in 1947 in *Land v. Dollar*, 330 U.S. 731, that a judgment would not be *res judicata* against the United States. That statement expresses the law applicable to the only facts to which it could or did relate. But our contention rests on facts *thereafter* occurring, which were not and could not have been before the court.

*Appellant (Br. 19, 20) refers to the District Court's statement that the United States will not be permitted to litigate its title unless "a substantial factual issue was present other than that decided in *Dollar v. Land*" and complains that the court "confuse[d] the *res judicata* issue with the question of the propriety of summary judgment procedure." It is appellant that is confused. The District Court was stating the difference between "*res judicata*" and "collateral estoppel" as applied to this case.

Up to the time of that decision the handling of the case by the Attorney General could have had no special significance, since the sole issue raised up to that point was whether the case could be maintained at all. It being decided that it could, *thereafter* the case proceeded on its merits.

If it was desired that the United States should not be bound by the eventual judgment, the Department of Justice should have been in the cause "only to protest against the exercise of jurisdiction by the court" and no further (*Clark v. Barnard*, 108 U.S. 436, 448). Being overruled on that protest, it should then have stepped out. It did not do so. Instead, as we have seen, the Attorney General and those acting under his supervision in the Department of Justice appeared in the name of defendants, tried the case on its merits, and handled it at every stage thereafter, in every court, through the several appeals, petitions in the Supreme Court, motions to vacate the judgment made in the name of the United States, of the Secretary of Commerce, and of the defendants, etc. And appellant is now asserting its claim in the instant case by the same counsel as have already presented it in *Dollar v. Land*.

ORDER OF DISCUSSION

Our discussion will proceed in the following order:

1. Modern law recognizes that one is bound by a judgment in a case in which he is not a party in circumstances such as are here present.
2. These principles apply fully to the United States.
3. The cases on which appellant relies do not support it.
4. Contrary to appellant's assertion, neither the Supreme Court nor any other court has held that the judgment in the District of Columbia litigation is not binding on the United States. The issue was never presented in any court until pleaded by answer below and raised by the motion for judgment, and it could not have been raised until then.

B. Under Modern Law, Where One Controls a Case He Is Bound by the Judgment Though Not a Party Formally.

The modern law on the subject of collateral estoppel is clear. As said in the *Restatement of Judgments*, Sec. 84:

A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.

"Comment:

"a. *Rationale.* * * * A person is entitled only to one adjudication of a cause of action or of an issue where he has control of the proceedings; if under the circumstances to which this Section applies a person has control over or participates in the control of the proceedings it is not unfair to him that the judgment or adjudication should determine the existence and the extent of interests which are dependent upon the determination of issues in the action leading to the judgment. * * *

"b. *Scope of rule.* * * * In the same way, where the one in control of the action or the defense has no interest in the precise subject matter of the suit but controls it because of his connection with the transaction out of which the suit arose, he is bound by and entitled to the benefits of the rules of res judicata upon issues which are actually litigated."

And see Section 83.

Judge Learned Hand, in *Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc.*, 116 F.2d 845 at 846 (2 Cir.), states:

"It has been settled doctrine in federal courts for at least seventy-five years that when a person not a party to the action takes over its defence, he may take advantage of the judgment if he wins, and he will be bound by it if he loses, exactly as though he were a party of record (*Lovejoy v. Murray*, 3 Wall. 1, 18, 19, 18 L.Ed. 129)."

Judge Hand here traces the roots of the doctrine back to *Lovejoy v. Murray*. In that case the Supreme Court held certain

persons bound by a judgment although they were not parties of record. Pointing out that they had assumed the defense, the Supreme Court said (3 Wall. 1, 18):

"They were defending their own acts, although the suit was in the sheriff's name. They had full right to make all defense there, which they could make here. They could adduce witnesses, and cross-examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf, as rendering a former judgment conclusive in a second suit. 'Justice requires', he says, 'that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between the same parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger; *but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound.*' "

And so in the present case the Department of Justice controlled *Dollar v. Land*, had the power to make the same case as here, produce witnesses, cross-examine, conduct appeals. *And it did all of these things.*

At the time of *Lovejoy v. Murray*, the doctrine of collateral estoppel was yet to develop to its present boundaries, for it still then was tied to questions of privity. Since then, the underlying principles of morals have broken through the confines of archaic expression. As said in *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F.2d 82 (3 Cir.) (at p. 84):

"That the doctrinal basis of *res judicata* is living law and not archaic formula is shown in its authoritative extension in recent years. *American Surety Co. v. Baldwin*, 1932, 287 U.S. 156 * * *; *Davis v. Davis*, 1938, 305 U.S. 32 * * *; *Stoll v. Gottlieb*, 1938, 305 U.S. 165 * * *; *Treinies v. Sunshine Mining Co.*, 1939, 308 U.S. 66 * * *."

In *Bruszewski v. United States*, 181 F.2d 419, 422 (3 Cir.), *cer. den.* 340 U.S. 865, the court, discussing the broadening of rules of conclusiveness of judgments, states:

"We are in accord with this development of the law away from formalism which impedes the achievement of fair and desirable results."

The full expression of the doctrine of collateral estoppel was not reached in the Supreme Court until 1910 in *Souffront v. Compagnie Des Sucreries*, 217 U.S. 475, at 486. There it was said:

"* * * The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record."

And see also *Hewes v. Gay*, 11 F.2d 165 at 166.

In *Caterpillar Tractor Co. v. International Harvester Co.*, supra, the court held that a judgment bound a person not a party who defended the suit on behalf of the record defendant, even though such participation was not open and avowed. After making the statement quoted at p. 19, supra, the court said:

"The defendant here is in the position of asking for two days in court if he successfully masked his participation upon his first appearance. * * * An argument which seeks to establish a rule directly contrary to this broad principle must justify itself pretty clearly to be successfully maintained."

It must be conceded—and appellant has in fact conceded—that *the facts of the litigation here would make the principles of collateral estoppel fully applicable if the suit were between private parties.*

But no different rule applies where a government is involved.

C. The Same Principles Apply to a Government, Including the Government of the United States.

The gist of appellant's discussion apparently is that different principles of *res judicata* or its allied body of law apply to the United States than to private parties.* And in this connection some shocking things are said. For example, the District Judge had quoted (R. 299) a passage from *Cruise v. City and County of San Francisco*, 101 C.A.2d 558, and appellant denies that this is the law of the United States (Br. 31). But the quoted passage had said:

"The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one."

Similar statements may be found in federal cases.† By denying them, appellant insists that a government may set a bad example and indulge in conduct the law will not tolerate in others.

In fact, the rules of *res judicata* and collateral estoppel applicable to the United States are the same as those applicable to anyone else.

In contending that the judgment in *Dollar v. Land* is not conclusive on it, appellant falls back on a statement in *Land v. Dollar*, 330 U.S. 731 (1947) which in turn was based on a passage in *United States v. Lee*, 106 U.S. 196, 222. But this very passage in the *Lee* case clearly conceived that the rights of the United States to relitigate any case were the same as those of any private party,

*Appellant goes so far as to say (Br. 28) that the Restatement of Judgments states that its general principles do not apply where the prior judgment is sought to bind the sovereign. The Restatement does not so state. It merely says that the extent of a sovereign's immunities is not a subject on which the Restatement purports to review the law.

†In *United States v. Utah, Nevada & California Stage Co.*, 199 U.S. 414, 423: "The same principles of right and justice should control * * * between the Government and individuals." *United States v. 43.7 Acres*, 43 F. Supp. 347: "But the Government must deal fairly and aboveboard with individuals and corporations, just as the Government expects the later to deal with it." (352). And see the cases cited at pages 52, 53, *infra*.

no more, no less.* At page 48, *infra*, we discuss the *Lee* case further and show that it does not support appellant.

In its opinion of May 18, 1951 in *Land v. Dollar*, 190 F.2d 623, 647 (1st col.), the Court of Appeals for the District of Columbia notes that the application of the rules of *res judicata* is the same as respects the United States as it is any other non-party of record.

In fact, *the Supreme Court has explicitly held that the rules of collateral estoppel do apply to the United States.*

In 1944, in *Drummond v. United States*, 324 U.S. 316 at 318, it said:

"* * * If the United States in fact employs counsel to represent its interests in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States v. Candelaria*, 271 U.S. 432; 16 F.2d 559, with *Logan v. United States*, 58 F.2d 697. But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy."

In *Dollar v. Land* the United States not only had the laboring oar, but the individual defendants wielded no oar at all (see pp. 13-16, *supra*).

In *United States v. Candelaria*, 271 U.S. 432, cited in the quotation above, the Supreme Court said (at p. 444) in answering a certified question:

"But, as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effec-

*The precise passage in the *Lee* case is this (p. 222):

"Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr v. United States*, already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies *which the law allows to every person, natural or artificial*, for the vindication and assertion of its rights."

tually concluded as if it were a party to the suit. *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486; *Lovejoy v. Murray*, 3 Wall. 1, 18; *Clafin v. Fletcher*, 7 Fed. 851, 852; *Maloy v. Duden*, 86 Fed. 402, 404; *James v. Germania Iron Co.*, 107 Fed. 597, 613."

Following this answer, the Eighth Circuit held, *United States v. Candelaria*, 16 F.2d 559, that a judgment in the prior action in a state court, to which the United States was not a party, nevertheless was conclusive against the United States.

These two cases apply to the United States the very same rules concerning conclusiveness of a judgment in an action to which it is not a party of record as are applied to private parties.

Appellant would distinguish the *Candelaria* case on the ground that the party for whom government attorneys appeared in the first suit was a plaintiff (Br. 27). That is a distinction without a difference. In support of its rule the Supreme Court in the *Candelaria* case cited the *Souffront* case, *supra*, where the Court stated the principle as applying indifferently to "one who prosecutes *or* defends a suit in the name of another to establish and protect his own right or who assists in the prosecution *or* defense of an action in aid of some interest of his own." In turn the *Candelaria* case was cited in the *Drummond* case as authority for the principle that the United States is bound by a prior suit to which it is not a party of record where its attorneys appeared for the defendant and had the laboring oar.

Thus the Supreme Court has had in mind no distinction between the situation of being on the plaintiff's side and defendant's side. The *Candelaria* case cited as its authorities the *Souffront* and *Lovejoy* cases and was in turn cited in the *Drummond* case. The United States Supreme Court has thus made it clear that *the rule applicable to private parties applies in all respects to the United States*.

Appellant appreciates the devastating effect of the *Drummond* case and so tried to escape it in the court below by calling it dictum. It was not dictum. It was a statement of the governing principle which the Court laid against the facts to decide the case.

Appellant does not now use the term "dictum," but its argument (Br. 27) is the same thing.

Appellant tries to distinguish the *Candelaria* case on another ground (Br. 27). It argues that what was involved in the first suit was the title of the Indian tribe, states that the United States was precluded only from relitigating the tribe's title, not any title it might assert in itself, and suggests that the reason was that the tribe was a party to the first suit. It is settled that the mere fact that an Indian tribe is a party to a suit does not preclude the United States asserting title in the tribe in a later suit over restricted Indian property. *Bowling v. United States*, 233 U.S. 528. The *Candelaria* opinion clearly shows that the United States would not have been precluded from relitigating the title of the tribe, its ward, *except for the fact that the United States had handled the case by its own attorney*. So also the fact that what was in issue was the tribe's title is pointless. The United States was precluded from relitigating whatever was decided in the first suit. So here, the United States is precluded from relitigating what was involved in *Dollar v. Land*, i.e., the nature of the 1938 stock transfers. If it should assert a title based on some other transactions, it would not be precluded (see pp. 19, 20, *supra*). But it asserts no other transaction.

Still other cases show that the principles on which we rely apply to governments as well as to private parties.

In *Gunter v. Atlantic Coast Line Railroad Company*, 200 U.S. 273, the State of South Carolina was held bound by a judgment rendered in a suit against county officers, and an injunction against maintaining another suit was sustained. The Supreme Court, noting (p. 283) that a State may not be sued without its consent and that a suit against state officers is not a suit against the state, pointed out that a state may, however, voluntarily become a party and will be bound if it does so (p. 284). It further noted that the state was there not a party *eo nomine* in the first suit and that the mere fact that the suit was against state officers did not make it a party (p. 284).

But it held that the state had voluntarily become a party, although not of record, *because the State Attorney General*, acting under authority of law, had appeared and filed the answer on behalf of individual defendants (p. 287), tried the suit and conducted the subsequent appeal in his name as their attorney.

Appellant's brief (p. 32) tries to distinguish the *Gunter* case by saying that there was express legislation authorizing maintenance of the suit against the sovereign. The only legislation there present was of the same character as is present here. The decision turned on (1) the fact of the Attorney General's appearance and conduct of the cause, (2) coupled with the fact that he was authorized under state statutes to appear in behalf of the private parties in view of the interest of the state. And both of these factors are present in the Dollar litigation (for the second, see pp. 34-36, *infra*).

The Supreme Court has always so regarded the *Gunter* case, as is shown by the passage from *Vail v. Arizona*, 207 U.S. 201, quoted at page 66, *infra*.

In *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, the Supreme Court held that the United States was bound by a judgment in a suit in which officers of the United States appeared with authority to represent its interests. It said (p. 403):

"The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. Cf. *Gunter v. Atlantic Coast R. Co.*, 200 U.S. 273, 284-289."

Appellant tries to distinguish this case by saying (Br. 32) that Congress had authorized the Bituminous Coal Commission, the party of record in the first suit, to represent the United States. By reason of the basic principles upon which *Dollar v. Land* proceeded, the named defendants, i.e., Land and the other members of the Maritime Commission were not representatives of the United States with authority to represent it within the meaning of this passage. But that is not the crucial point. The crucial fact

is that *the Attorney General and the Department of Justice under his direction* certainly were authorized representatives of the United States to do so. And, when in earlier litigation, authorized representatives of the United States, whoever they are, have appeared, it is bound, though never a party of record. The citation of the *Gunter* case in the *Sunshine* opinion so shows.

The essence of the issue, then, is whether the Attorney General of the United States had statutory power to appear in the name of the nominal defendants in Dollar v. Land and conduct the litigation. At pages 34-36, *infra*, we show that he had.

In *Hill v. Wallace*, 259 U.S. 44, 63, the Court held that where the Department of Justice appears and argues a case, the decision has binding consequences with respect to the United States, though it is not a formal party.

In *New Orleans v. Gaines' Administrator*, 138 U.S. 595, the principle of collateral estoppel was applied to a city government. In prior suits the plaintiffs had recovered judgment for property against those in possession, who had purchased the property from the City of New Orleans, the City assuming the defense by its counsel. The court said:

"The judgments were binding on the parties to them, and therefore were binding upon the city of New Orleans, which in most cases had assumed the defense of the suits, and had been represented by counsel therein. We supposed that it was right and proper to consider litigation as at an end in those suits, and that the judgments had passed into *res adjudicata*." (138 U.S. at 607)

In *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, suit was brought against the Treasurer of Porto Rico. The Attorney General of Porto Rico appeared on his behalf, filed an answer to the complaint, stipulated to trial, etc. Later he raised the defense that the suit was really one against Porto Rico, a sovereign. The court held, as stated in the headnote, that in view of "the solemn appearance of, and the taking of other steps by, the Attorney General," "the government could not deny the jurisdiction," citing *Gunter v. Atlantic Line*, *supra*.

**WHEN THE SUPREME COURT DECIDED IN 1947 THAT DOLLAR V. LAND
COULD BE MAINTAINED, THE ATTORNEY GENERAL WAS PUT TO HIS
CHOICE, TO STAY IN OR TO GO OUT.**

The crucial point at which the Attorney General had to make an election was when the Supreme Court in 1947 decided in *Land v. Dollar* that the case could be maintained.

To repeat what we have said, the defense of the case by the Attorney General up to that time could have had no special significance, since the sole issue raised up to that point was whether the case could be maintained at all. Until then he was in the cause "only to protest against the exercise of jurisdiction by the court" (*Clark v. Barnard*, 108 U.S. 436, 448). It being decided that it could, thereafter the case proceeded on its merits. Being overruled on that protest, the Department of Justice should have stepped out, if it did not desire the United States to be bound by the eventual judgment. It did not do so.*

And *Porto Rico v. Ramos*, 232 U.S. 627 shows that the Attorney General had to make his choice at that juncture. He could step out of the case or, deciding that the interests of the United States were better served by handling the defense on the merits, he could stay in. Since he chose the latter course, the judgment binds the United States. In the *Ramos* case, Porto Rico was held bound where the Attorney General decided to step into an action in ejectment, involving the right of certain individuals to possession of property coming to Porto Rico by escheat. As the court said (p. 631):

"If held in wrong by them, it was held in wrong by it, and the Attorney General may have considered it well worth while to face the controversy rather than remit it to some other proceeding that the plaintiff might institute, fortified, perhaps, by a decision in his favor. *United States v. Lee*, 106 U.S. 196 * * *.

*The United States is bound by election, like anyone else. *United States v. Oregon Lumber Co.*, 260 U.S. 290, 301; *United States v. Brown*, 86 F.2d 798 (6 Cir.). The doctrine of election has "for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause," *United States v. Oregon Lumber Co.*, supra.

“* * * the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step.”

And so here. In the language of the *Ramos* case if the stock was “held in wrong” by the Maritime Commissioners, “it was held in wrong by it,” the United States. The Attorney General could have left the individual defendants to defend the suit on their own. Had he done so, the judgment would not bind the United States. But he apparently felt that on their own those defendants would not present the kind of case that could be put up by the Department of Justice, armed with the Treasury of the United States, the manpower of the Department of Justice, and the investigative resources of the FBI.

Probably he had an overweening confidence that he could defeat the Dollars. Possibly he felt that a judgment against Land, et al. would give some advantages to the Dollars in any subsequent litigation with the United States. He therefore preferred to come in. The Attorney General of the United States could have stayed out—or come in. He came in, hoping to win the case and benefit the United States by a victory. The United States cannot escape the consequences of his defeat. The law cannot give its sanction to a “heads I win, tails I do not lose” attitude.

As said in 65 Harvard Law Review about this very matter (477):

“If the private litigant must cope with the powerful litigation forces of the United States, he should derive some benefit from his effort. Since the Government could ignore the suit and later sue to repossess the property, its voluntary participation should constitute at least the partial waiver of immunity achieved by applying collateral estoppel.”

A similar idea is expressed by Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 177:

“When the Government becomes the moving party and levels

its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path."

In *United States v. Ring Constr. Corp.*, 96 F. Supp. 762, 769, the court notes:

"The principle of res adjudicata necessarily is predicated upon the hypothesis that substance, not form, controls. For otherwise the rule's inherent purpose to end litigation would itself be form rather than substance and the rule would not serve the useful ends at which it is aimed."*

Appellant's failure to note the obvious distinction between the Attorney General's handling of the case until the jurisdictional issue was settled and his handling of the case on the merits thereafter vitiates a bulk of its citations. Cases where the United States appears by its Attorney General to assert that the suit is one against the sovereign and therefore cannot be maintained are simply irrelevant. In such cases the Attorney General was in the case "to protest against the exercise of jurisdiction by the court" (see p. 21, supra). In none of them did he appear in the name of the individuals on the merits after the defense of sovereign immunity was overruled by the highest court to which it could go. In this class fall *Minnesota v. United States*, 305 U.S. 382; *Larson v. Domestic & Foreign Commerce Co.*, 337 U.S. 682; *Scranton v. Wheeler*, 179 U.S. 141; *Stanley v. Schwalby*, 162 U.S. 255; *Belknap v. Schild*, 161 U.S. 10, and *United States v. Lee*, 106 U.S. 196. Thus in the *Minnesota* case the United States was joined as a defendant and moved to dismiss on the ground that it could not be sued and that it was an indispensable party. The Attorney General did not appear for the other defendants, he stayed in the case only because his motion was overruled, and he obtained reversal in the Supreme Court on the ground that the motion

*In that case the principles were applied against a private litigant and in favor of the government.

should have been granted. In the *Larson* case, the plea of sovereign immunity was sustained in the trial court and affirmed, and that was the only issue presented. In the *Stanley* case, the defense of sovereign immunity was raised, overruled below, pressed and sustained above. The *Belknap* case is similar.

Dollar v. Land was just such a case up to the time that the Supreme Court held that the suit could be maintained against the individuals. *It then became a different kind of case so far as participation and control by the Department of Justice are concerned.*

D. The Attorney General Had Statutory Authority to Handle the Case and in Doing So He Represented the Interests of the United States.

Appellant assigns no reason in morals or justice why a different rule should apply to the United States than to a private litigant. In the last analysis it takes refuge in the "doctrine of sovereign immunity". *But to invoke that doctrine is to beg the question.* If that doctrine has the remotest bearing, it is obvious that the sovereign may waive its immunity. If it comes into the court as an actor, it subjects itself to the court's jurisdiction, and it may do so in other ways.

The crucial question, then, is the simple one whether the Attorney General had statutory power to control the litigation and to use the whole law machinery of the United States for the purpose. As said in 65 Harvard Law Review at 477:

"Certainly if the Attorney General had authority to come into the case in his official capacity the United States should be barred", citing the *Gunter* case, *supra*.

The answer is that *he had the power*. What he did he was doing under full authority of the law. His conduct of *Dollar v. Land*, the large expenditure of money involved, and the use of services of employees paid by the taxpayers *would have been a gross squandering of public funds on behalf of private litigants*, unless he acted under such authority.

That authority is found in 5 U.S.C., Sec. 309, 316.*

It is the Attorney General "who is customarily charged with representing the Government's interests in court," *United States v. Allied Corp.*, 341 U.S. 1, 5.

It is not necessary for the Attorney General to intervene formally in the name of the United States in order to present its interests and control the litigation. "Regardless of captions, the issue in these cases could not change and the real party-in-interest * * * has always been the same", *United States v. Allied Corp.*, supra, at 5. As stated in *Booth v. Fletcher*, 101 F.2d 676, 681 (D.C. Cir.):

"The law provides that the Attorney General, *whenever he deems it for the interest of the United States*, may, in person, conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so. It does not limit his participation or the participation of his representative to cases in which the United States is a party; it does not direct how he shall participate in such cases; it gives him broad, general powers intended to *safeguard the interests of the United States in any case*, and in any court in the United States, whenever in his opinion those interests may be jeopardized."

Under the statutes cited, the Attorney General has broad power to conduct and to control litigation "in order to establish and

*"§ 309. *Conduct and argument of cases by Attorney General and Solicitor General.* Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

"§ 316. *Interest of United States in pending suits.* The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

safeguard government rights and properties." Cf. *Tidelands Oil* case, *United States v. California*, 332 U.S. 19, 26-28. To this end he may intervene in actions against others to assert claims of the United States. *New York v. New Jersey*, 256 U.S. 296, 308; *United States v. Bank of New York*, 296 U.S. 463.

He is the officer in charge of "litigation necessary to establish the rights of the government," but he has no right to use his office and its resources for private interests. *San Jacinto Tin Co. v. United States*, 125 U.S. 273, at 279, 283, and see 305.

**NO QUESTION IS INVOLVED OF THE POWER OF THE ATTORNEY GENERAL
TO WAIVE IMMUNITY OF THE SOVEREIGN FROM SUIT**

Appellant argues that the Attorney General has no authority to waive the government's immunity from suit. At page 27, supra we showed that argument to be pointless when we noted that the Supreme Court in the *Candelaria* and *Drummond* cases drew no distinction between cases where the Attorney General appeared for plaintiff and where he appeared for defendant.

The same argument was made and rejected by the Supreme Court in the case just cited, *United States v. Bank of New York*, 296 U.S. 463. In that case it was held that the United States was precluded from maintaining an independent suit in a United States District Court to assert a claim to certain funds because proceedings to dispose of the funds were already pending in a New York State court. It was held that the only recourse of the United States was to intervene in the state proceedings. The government argued that to require it to intervene meant that the United States would be compelled to become a defendant without its consent. The argument was rejected (p. 480):

"In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant."

In *Clark v. Barnard*, 108 U.S. 436, in a suit against the Treasurer of Rhode Island (not the State of Rhode Island), the defendant demurred that the suit was against the state. Thereafter

the same attorneys filed a claim to funds in the registry of the court in the name of the State, asserting it to be without prejudice to the demurrer. This Court held that the voluntary appearance and assertion of the claim was an intervention by the State as claimant and as an actor, and that therefore the State was bound (pp. 445, 448). It had become necessary to "adjudicate the adverse rights of the State and the appellees to the fund". Precisely that was necessary in *Dollar v. Land*, and the claim of the United States was being presented by its authorized agent, the Attorney General.

The Attorney General, had he wished, could have intervened in *Dollar v. Land*, in the name of the United States, either in the District Court or in the Court of Appeals (see p. 36, *supra*). Had he done so the United States would, of course, be bound.

Appellant, in effect, concedes that this is so, because it tries to evade cases like *Clark v. Barnard* by saying (p. 32) that the United States never sought to be made a party to the District of Columbia litigation. But *it is what one does, not what he calls his action, that controls*. If one appears in a cause, he is bound. "It must be recognized that a person can 'appear' so as to be bound by a decree of the court without an order of intervention." *Andrews v. Andrews and Andrews, Inc.*, 42 F. Supp. 5; 6 Cyc. Fed. Proc. (2d ed. 1943), p. 515, Section 2408. This applies to the United States. *In re Read-York Inc., United States v. Davies*, 152 F.2d 313 (7 Cir.).

In *United States v. Guaranty Trust Co.*, 76 F.2d 747 (2 Cir.), trustees of a spendthrift trust refusing to turn over certain incomes to a beneficiary, he applied to the state Surrogate court to compel them. Although the United States was not served, an Assistant United States Attorney filed an affidavit and brief in opposition, requesting the Surrogate to order the income to be used to pay taxes due the United States. The Surrogate held that the income could not be reached for taxes. Thereupon the United States sued in the federal court to compel the trustees to pay the taxes. The bill was dismissed on the ground that the United States was bound by the Surrogate's decree.

In *United States v. Jacobs*, 100 F. Supp. 189, after Jacobs had recovered a personal injury judgment in a state court against a railroad, the latter paid the money to the Clerk. The Railroad Retirement Board, an agency of the United States, notified the Clerk that it claimed a lien on the money, and the Clerk sued in interpleader in the state court. The United States Attorney filed an answer setting up the Board's claim to the fund. The state court dismissed the bill in interpleader on the ground that the Board was not a bona fide claimant, and the Board's appeal was dismissed by the State Supreme Court. Thereupon the United States sued in the federal court, joining Jacobs, the Clerk of the state court, and the railroad, asserting the same claim. The court dismissed the action on motion for summary judgment, as foreclosed by estoppel by judgment, citing *United States v. Guaranty Trust Co.*, supra. It said:

"To avoid the application of res judicata, plaintiff relies heavily upon the hoary axioms of the law that the United States cannot be sued without their consent; that their sovereign immunity can be waived only by Act of Congress; that the United States Attorney cannot waive their sovereign immunity in the absence of an Act of Congress; and that no Act of Congress waives the immunity of the Railroad Retirement Board from suit in the State Court."*

Noting that

" 'when the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors,' "

the court said:

"However, that which was done was the equivalent of a voluntary intervention to enforce the right of the United States to such funds. That the United States have a right to bring suit by their attorney in courts of the several states to enforce their contracts and protect their property without special statutory sanction is not open to doubt."

*The United States cited the cases it cites here, including *Carr v. United States*, 98 U.S. 433; *Minnesota v. United States*, 305 U.S. 382; *United States v. Lee*, 106 U.S. 196; *Stanley v. Schwalby*, 162 U.S. 255.

Appellant argues that in *Dollar v. Land*, the United States did not appear "formally or informally" (p. 32). By this it can only mean that it did not appear "eo nomine."

But this argument at once shows that the reliance on sovereign immunity is a sham and begs the question. The doctrine of collateral estoppel teaches that one need not be a party to a cause, eo nomine, in order to be bound:—he is bound if he controls and conducts the litigation. And it is of no consequence at all that the Attorney General has not appeared for the United States, eo nomine. *Gunter v. Atlantic Coast Line Railroad Company*, 200 U.S. 273; *Drummond v. United States*, 324 U.S. 316, 318. The only possible limitation on the application to the United States of the doctrine of collateral estoppel would be that the United States cannot thereby be bound where it would not be bound if it did appear eo nomine.

The moment it is conceded—as it must be—that the Attorney General could have formally intervened in *Dollar v. Land* in the name of the United States to assert its title, it follows that it is bound, if the other facts are such as to make the doctrine of collateral estoppel applicable, as they here are.

What is important are the substantive realities, not names or labels. As said in *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 620, "Identity of parties is not a mere matter of form, but of substance * * * parties nominally different may be in legal effect, the same."*

APPELLANT'S CASES RE WAIVER OF IMMUNITY

Appellant's citations that the Attorney General may not waive sovereign immunity from suit are not in point. Where the Attorney General asserts title in the United States, the court is not

*In our belief the United States did intervene in the cause in its own name. See p. 45, *infra*. If it did, the doctrine of *res judicata* applies. If it did not, the doctrine of collateral estoppel applies. See p. 19, *supra*. In footnote 26 on p. 23, appellant's brief refers to a statement in *Land v. Dollar*, 188 F.2d 629, 632. That pertains to the question of appearance *eo nomine*.

restricted to holding that the claim of the United States is invalid. It may quiet title in the defendant against the United States. See *United States v. Utah*, 283 U.S. 64 at 90, decree quoted at 283 U.S. 801.* The underlying principle is that when the United States, by any authorized representative (e.g., Attorney General), presents a "subject matter" to the court, the court may adjudicate that subject matter, and the adjudication binds the government. The doctrine of sovereign immunity stands aside.

Thus in *The Thekla*, 266 U.S. 328, the court (per Holmes, J.) pointed out (p. 339-341):

"When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter*. * * *

"* * * the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. * * * It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

Appellant's citations such as *United States v. United States Fidelity Co.*, 309 U.S. 506; *United States v. Shaw*, 309 U.S. 495, are cases where money judgments were sought against the United States. It was held that the fact that the United States asserted a money claim against the private party would have permitted adjudication against it of a counterclaim to the extent necessary to offset the claim of the United States, but not judgment on a cross-complaint in excess of that amount. In *The Thekla* the United States intervened in admiralty and was held bound to a

*In *Jones v. Watts*, 142 F.2d 575 (5 Cir.), the court said:

"It is well settled that when government invokes the aid of the court as a litigant it stands as any other litigant, with the same obligation to give effect to the rights of the person sued. It cannot ask the court to render a judgment or to enforce it without submitting itself to do justice." (p. 577)

decree against it for damages. In *United States v. Shaw* the Supreme Court said that in admiralty the "subject matter" was the collision itself. *The Thekla* was approved as to the "subject matter" doctrine, but it was held that the "subject matter" of a claim for money at law does not comprise excess cross-complaints. That limitation has no relevance here. The case of money claims is wholly different than contests over the right to property. The assertion by A of a right in property against B necessarily permits a court to hold that B's rights are superior to A's.*

**CASES WHERE THE DEPARTMENT OF JUSTICE IS AUTHORIZED BY STATUTE
TO FURNISH LEGAL SERVICES TO PROTECT A PRIVATE INTEREST ARE
NOT IN POINT.**

By its selection of cases to cite appellant shows that it is not confronting the precise issue here involved or the kind of facts on which it is based.

The principle we invoke, as stated in the *Souffront* case and the *Restatement of Judgments*, is that one who is not a party of record is nevertheless bound by the decision of the issue litigated if he prosecutes or defends the suit in the name of a party to establish and protect his own right or in aid of some interest of his own.

Now there are situations where Congress has authorized a United States attorney to appear and represent the interests of

**Munro v. United States*, 303 U.S. 36 was a suit for a money judgment against the United States. The position of the United States was purely that of a defendant and in no wise that of an actor.

In *Minnesota v. United States*, 305 U.S. 382, suit was brought in a state court to condemn a right of way across Indian lands. The United States was an indispensable party to such a suit and was named as a defendant. The United States Attorney removed the cause to the federal court and then moved to dismiss it for lack of jurisdiction over the United States. The District Court denied the motion because of a statute which permitted condemnation suits over Indian lands. The Supreme Court held that the statutory consent was to the maintenance of such suits in federal courts only, not to the institution of such a suit in the state court. And the jurisdiction of a federal court in a removed action is no greater than jurisdiction of the state court itself.

private litigants. An example is the representation of returned veterans to obtain their former jobs under the old Soldiers' and Sailors' Relief Act (Title 50 U.S.C. App. Sec. 308(e)) and the Universal Military Training and Service Act (50 U.S.C. App. Sec. 459d). In such cases, the fact that the United States Attorney has been in the case does not bind the United States, for no property interest of its own is involved, and the attorney has appeared under authority to protect a private interest and not that of the United States.

Such a case is *Goddard v. Frazier*, 156 F.2d 938, cited by appellant (Br. 28) to avoid the *Candelaria* and *Drummond* cases. There the United States Attorney had appeared in private litigation to represent an Indian. He did so, *not* under authority of law to protect the interests of the United States, but under authority of a special statute authorizing him to appear for the Indian.

The Tax Collector cases cited by appellant (Br. 23) are of the same character. The leading one is *Sage v. United States*, 250 U.S. 33, and their history, rationale and peculiarities as part of the fiscal system are summed up in *United States v. Nunnally Investment Co.*, 316 U.S. 258.

In *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 at 403, the court, citing the *Sage* case, states that these tax collector cases are not in point. The *Sage* case in turn points out (250 U.S. at 37) that those cases do "not concern property in which the United States asserts an interest." Government attorneys appear for tax collectors *not* under authority of statute empowering the Attorney General to protect and enforce the interests of the United States but under authority of a special statute authorizing United States Attorneys to defend the private litigant (28 U.S.C., Sec. 507(a)(3)). Historically, the tax collector is personally liable for unlawful exactions. He pays the judgment out of his own pocket, except so far as Congress sees fit to have the Treasury protect him.

In the *Sunshine* case, *supra*, the court contrasts the *Sage* and like cases with *Gunter v. Atlantic Coast Line Ry. Co.*, 200 U.S. 273 (discussed *supra*, p. 28).

Contrast *Land v. Dollar* with the tax cases. Here the Attorney General had no authority from any statute to defend the defendants *as individuals*. His authority to act was the general statute empowering him to protect the interests of the United States (see p. 35, *supra*). It was the alleged title of the United States which he sought to protect, and on that basis he asked judgment against the Dollars.

Appellant tries to justify the Attorney General's conduct of the litigation in *Dollar v. Land* on a different basis (Br. 26). It argues, in effect, that unless the Attorney General defends suits brought against officers, the officers would have to do so out of their own pocket. But if the Attorney General should refuse to defend, and thus stand on the rule that by staying out of the case the United States remains aloof from an adverse judgment, the individual officer may refuse to defend at his own expense, for he has no personal interest and the outcome is of no personal concern. If he persists in maintaining the defense, where the Attorney General declines to take over, he is persisting in a purely personal tort. If it be argued that thereby he would fail to protect the interests of the United States fully, that argument at once concedes that it is the latter's interests and not that of the individual that the Attorney General really asserts. If, as said in *Porto Rico v. Ramos*, 232 U.S. 627, the Attorney General decides that the interests of the United States are better protected by coming in and defending, *why should it not be bound? It has had its day in court.* The case is like patent infringement cases. If a suit is brought against a small merchant who has bought a few articles from a manufacturer, the manufacturer may decline to defend the suit and will not be bound by the judgment.

The Attorney General was not handling Dollar v. Land merely to give a lawyer to the individual defendants. He handled it in order to assert title of the United States. Otherwise he was acting illegally in using his office and its resources. *San Jacinto Tin Co. v. United States*, 125 U.S. 273, 279, 305.

Common sense reality is shown by the statements of the attorneys of the Department of Justice quoted above (pp. 14, 15,

supra). In no other way can the action of the government counsel be explained.

ACTION OF THE ATTORNEY GENERAL AFTER DECISION ON THE MERITS

For example, after the decision of the Court of Appeals in July 1950, *Dollar v. Land*, 184 F.2d 245, and denial of certiorari in November 1950, 340 U.S. 884, and after the filing of the mandate in the District Court, the following occurred:*

On December 7, 1950, the Attorney General opposed entry of judgment under the mandate, in the name of the Secretary of Commerce, Mr. Sawyer. In the name of the Secretary he stated the objection that he had been directed by the President to hold the stock and "to take all appropriate action to assert and maintain the government's rights as owner of the stock" (Supp. Tr. 9, 10). Attached to his opposition was copy of a letter to him from the President, directing him to "assert and maintain the Government's rights" (Supp. Tr. 11).

Concurrently, the Attorney General, in the name of the defendants, objected to the entry of a judgment, even against the Secretary of Commerce, on the ground that the Secretary of Commerce "is the official custodian of this stock for the United States", asserting that "possession of said stock and title thereto are in the United States", and that "Charles Sawyer as Secretary of Commerce has been directed by the President of the United States to continue to hold the stock on behalf of the United States and to take all appropriate action to assert and maintain the Government's rights as owner of this stock" (Supp. Tr. 5-7).

Then judgment was entered for the Dollars on December 11, 1950, over these objections—a judgment that imposed no personal liability for damages on defendants. Thereupon the Attorney General, in the name of the United States, *eo nomine*, and of Mr. Sawyer, as Secretary of Commerce, filed motions to vacate the judgment (Supp. Tr. 44, 45).

*The facts are shown by the Supplemental Transcript of Record in the Supreme Court, No. 552. That is part of the record herein. See p. 9, *supra*.

From the denial of this motion, and from the judgment, the Attorney General appealed, in the name of the United States, in the name of Mr. Sawyer, and also in the name of the defendants, protesting that the judgment quieted title against the world (Supp. Tr. 47, 48).*

In all these activities the United States and Mr. Sawyer were represented by identically the same counsel as the nominal defendants, i.e., the same attorneys in the Department of Justice.

Obviously, the question whether the judgment quieted title or merely directed transfer of possession was of no concern to the defendants, as individuals. It was already adjudicated that they had no right to retain possession, and, if the decree went further, it did not aggrieve them in any personal capacity.

Again, after the appeal was dismissed on January 31, 1951 with direction for entry of a judgment *in haec verba* (188 F.2d 629), and after judgment was entered against Mr. Sawyer as successor of the defendants, the Attorney General appealed again, this time using the names of defendants Land, et al. as well as that of Sawyer (R. 190, Admitted, R. 244, 254).

It is inescapable that defendants were mere "lay figures" used by the Attorney General for his purposes to assert the government's title.†

*Transcript in No. 552, pp. 20, 21. This is also part of the record herein (see p. 9, *supra*).

†*Res judicata*: We believe that what was done after November 13, 1950 by the Attorney General, in appearing in the names of the United States and of Mr. Sawyer, made the United States party to the suit and resulted in its being bound by *res judicata*. It is not, however, necessary to argue that point, because the collateral estoppel is clear, and it is sufficient.

The basis of our belief as to *res judicata*, as distinguished from collateral estoppel, may be summarized. The activity in the names of the United States and of Mr. Sawyer, as Secretary of Commerce, was the equivalent of an intervention. One can appear so as to be bound without a formal order of intervention (p. 37, *supra*). A motion to vacate a judgment is itself a general appearance. *Feldman Investment Co. v. Connecticut General Life Insurance Co.* (10 Cir.), 78 F.2d 838 at 841 (2d col.); *Slocum v. Edwards* (2 Cir.), 168 F.2d 627 at 631 (2d col. body). This applies to the United States. *In re Read-York, Inc.*, 152 F.2d 313

E. The Cases on Which Appellant Relies Do Not Support It.

We have already commented on the cases cited by appellant in discussing the subject on principle (pp. 39-43, *supra*) and we have noted that cases involving appearance by government attorneys prior to final determination of the jurisdictional question whether a suit is one against the United States are irrelevant (p. 33, *supra*).

We now turn to the other cases which appellant cites as direct authority.

The case principally relied on is *Carr v. United States*, 98 U.S. 433, decided in 1878. It was there held that judgment in a prior suit against government officials, for possession of property, was

(7 Cir.). And where one intervenues he is bound by the record as it stands at the time. The rule applies to the government. As said in *State of Kansas v. Occidental Life Ins. Co.*, 95 F.2d 935 (10 Cir.) at 936:

"One cannot voluntarily intervene after an appeal and then be heard to litigate anew questions determined on the appeal [citations omitted]."

See also *Galbreath v. Metropolitan Trust Co.*, 134 F.2d 569, 570 (10 Cir.); *Godfrey L. Cabot, Inc. v. Binney & Smith Co.*, 46 F. Supp. 346. And see 39 *Am. Jur.* 950, Sec. 79; 67 C.J.S. 1010 and 1011, Section 70; *Allen v. California Water and Telephone Co.*, 187 Pac.2d 393, 31 Cal. 2d 104. One who appears, after judgment, by motion to vacate it is just as bound by it as if he had originally appeared and participated in the trial. *Richardson v. First National Bank of Seminole*, 186 Okla. 203, 97 Pac.2d 39 at 40 (2d col.).

The opposition to entry of judgment, motions to vacate, and the appeals were labeled "special appearances." But one does not prevent his appearance from being general by calling it special. *Davis v. Davis*, 305 U.S. 32, 42. *Jos. Riedel Glass Works, Inc. v. Keegan*, 43 F. Supp. 153, 159 (para. 6). If one appears in order to assert rights, he becomes an actor, he has submitted to the jurisdiction of the court, and he "must take the consequences." *Merchants Heat & L. Co. v. Clow & Sons*, 204 U.S. 286 at 290 (Holmes, J.); *Davis v. Davis*, *supra*.

If the motions to vacate had been confined to jurisdictional grounds, a different question would be presented. But they were not so confined. They sought affirmative relief. If the judgment did not bind the United States, it was unnecessary for it to move to vacate. Nor did it stop with some motion confined to its own alleged rights. It moved to vacate the judgment generally, even as to the named defendants (Supp. Tr. 44).

The only purpose of Mr. Sawyer's opposition to entry of judgment and of his motion and that of the United States to vacate was to prevent the Dollars from securing the possession to which that judgment entitled them, and the means of doing so was the assertion of superior title in the United States.

void on the ground that it was a suit against the sovereign, the court losing jurisdiction the moment defendants asserted title in the government (p. 438). But *United States v. Lee*, 106 U.S. 196, expressly overruled the *Carr* case (p. 216). Appellant admits that it did so, but argues that the part of the *Carr* case so overruled was mere dictum (Br. 19, fn. 15). On the contrary, it was the heart of the decision.

In fact, the *Carr* case rests on a basic outlook that has been completely overruled. Thus, in stating the rationale of its decision, the court said (p. 438), "Otherwise, the government could always be compelled to come into court and litigate with private parties in defense of its property." Yet in *United States v. Bank of New York*, 296 U.S. 463, this very argument was swept aside as unsound. As already noted (p. 36, *supra*), it was there held that the United States was precluded from bringing an independent suit to assert a claim to certain funds, by reason of the pendency of a prior action in a New York State court concerning disposition of those funds. The Supreme Court held that the only recourse of the United States was to intervene. In so holding, the Supreme Court was unimpressed by the government's argument that to so hold

"would compel the United States, as the only means of asserting its right to this particular property, to enter its appearance in the pending actions in the state court" and that "So to limit the rights of the United States is in practical effect to subject the United States to suits without its consent." (p. 466)

Appellant notes that in the *Carr* case reference was made to the fact that in the earlier suit an attorney "was employed and paid by the Secretary of the Treasury" to represent defendants and that "the person who was district attorney of the United States for the district of California at the time" also appeared as attorney for the defendants.

However, there is no statutory authority for the Secretary of the Treasury to employ attorneys in behalf of the United States. His situation is unlike that of the Attorney General, who does have

statutory power, as we have shown (p. 35, *supra*). The Secretary of the Treasury has none. Similarly, district attorneys acting on their own initiative, or at the request of anyone other than the Department of Justice, have no such power. The power to appear and assert the interests of the United States is vested by law in the Attorney General and those acting under his direction.

Thus the facts of the *Carr* case are wholly unlike the facts of the present litigation.

Moreover, the argument made in the *Carr* case that the United States was concluded by the prior judgment was not based on *collateral estoppel*—a doctrine then hardly in existence—but a different principle, namely, “that where a tenant or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action” (98 U.S. at 437). The court held that rule inapplicable.

Despite the fact that *United States v. Lee*, *supra*, overruled the *Carr* case, appellant argues that the *Lee* case is authority against us as to effect of representation by attorneys acting under direction of the Attorney General. We submit that the *Lee* case is not authority for appellant.* As we have seen (p. 25), the *Lee* case clearly conceived that the right of the United States to relitigate a case is the same as that of any private party, no more, no less. The *Lee* case then stated the rule of *res judicata* in its simplest form, that where one is not a party to a cause, he is not bound by the judgment. That simple statement is certainly no longer a complete or exact statement of the law as respects the various situations in which a judgment may bind one. And, of course, the court in the *Lee* case was not endeavoring to lay down the bounds of collateral developments more or less related to *res judicata* or to freeze the law as respects the United States while leaving it free to grow as respects all others.†

*The passages from the *Lee* case quoted by appellant (Br. 21) pertain to the effect of the defendants' being officials of the United States.

†The Supreme Court has frequently quoted or referred to the “oft repeated admonition of Chief Justice Marshall” in *Cohens v. Virginia*, 6

The *Lee* case was decided in 1882, and, as already noted, not until 1910 did the Supreme Court definitively state the rules of collateral estoppel, in the *Souffront* case; and the *Candelaria* case was not decided until 1926, or the *Drummond* case until 1944.*

If the early cases of *Carr* and *Lee* could be deemed to lend support to appellant's argument, then it could be said, in the words of 65 Harvard Law Review at 477:

"Certain older cases, using broad language to the effect that Government officials cannot waive the immunity of the sovereign, did hold that a judgment in such a case could not prevent the United States from relitigating the issues. More recently, however, the Supreme Court in *Drummond v. United States*, has indicated its support of the fairer rule that when counsel have been employed to represent the interest of the United States, the Government is bound by the determined issues.

"A distinction can validly be drawn here between applying merger or bar to the Government and applying collateral estoppel. In the latter case, if the Government presents new issues it may be heard. Absent such untried issues, the Government should not have a second day in court, a privilege denied to the private litigant."

Wheat. 264, that language used when the court was concentrating on one problem is not to be over-extended to a case where it is dealing with another. E.g., *Wright v. United States*, 302 U.S. 583 at 593; *Osaka Shosen Line v. United States*, 300 U.S. 98 at 103; *Humphrey's Executor v. United States*, 295 U.S. 602, 627. Chief Justice Marshall's famous statement was this:

"it is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (6 Wheat. at 399).

*Appellant (Br. 30) quotes from Freeman on Judgments. But Freeman was published in 1925, one year before the *Candelaria* case.

And one may also repeat what was said in *American Propellor & Mfg. Co. v. United States*, 300 U.S. 475, 478:

"We have said * * * 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. * * * *The reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest.*' If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

Appellant quotes at length from *Tindal v. Wesley*, 167 U.S. 204. It has nothing to do with the question of the effect of control of litigation by the Attorney General. It merely held that the particular suit was not one against the State of South Carolina, adding that the fact that defendants were state officials would not preclude the state. How defendants were represented nowhere appears.

Nor are other cases cited in point. In *Cunningham v. Macon, etc. R.R. Co.*, 109 U.S. 446, it was held that the suit was one against the state and therefore not maintainable. In *McClellan v. Carland*, 217 U.S. 268, in a suit between private parties in a federal court, the State of South Dakota sought to intervene to assert title, through escheat, paramount to both litigants. Its motion to intervene was denied, but the federal court stayed proceedings to permit the State to sue in its own courts. The sole question before the Supreme Court was whether the stay was properly granted. Holding that it was not, the court remarked (p. 282) that the question of the right of the State to intervene was not before it, "but if not made a party to the suit, its rights would not have been concluded by any adjudication made therein." No question resembling any in our case was present, since the

only issue in the federal court in the absence of the intervention would be the rights of private parties, none of whom asserted title in the State.

Hussey v. United States, 222 U.S. 88, was a suit in the Court of Claims for damages brought under a special enabling act. There had been a prior ejectment suit in a state court. While the effect of the judgment in that action was raised, the litigant did not argue or rely on the doctrine of collateral estoppel, but rested on different arguments, namely, that judgments of state courts with respect to real property have a peculiar conclusiveness and that the scope of the Court of Claims' inquiry was limited by the special act of Congress.*

*Appellant also cites in a footnote, pp. 22, 23, a number of inferior court decisions. None is in point. *Crane v. United States*, 44 Ct. Cl. 324, is merely the lower court decision in *United States v. Hussey*, supra; and *Scranton v. Wheeler*, 57 Fed. 803, is the lower court decision of the same case in 179 U.S. 141, discussed at p. 33, supra.

In *United States v. McIntosh*, 2 F. Supp. 244, after commencement of an ejectment suit in a state court against a government agent but before that case was tried, the United States sued to quiet title, obtained a preliminary injunction against the maintenance of the state suit (57 F.2d 573) and later obtained a final decree. The state suit never went to judgment; it was stopped in its initial stages. No question of *res judicata* or estoppel by judgment was present because there was no judgment. What the United States there did was the honorable thing: It openly submitted its claim to judicial determination at a first trial, instead of trying to maneuver, as here, so as to gain the benefits of such a trial, if successful, but to escape its consequences if unsuccessful.

In *United States v. Van Horn*, 197 Fed. 611 (Dis. Ct., Colorado, 1912) there is reference to a prior decision in a state court, but it does not appear that the Attorney General had anything to do with it, and that subject is not discussed.

In *Blondet v. Hadley*, 144 F.2d 370, and *Wood v. Phillips*, 50 F.2d 714, the sole question discussed was the jurisdictional one whether the suit was against the government. There is no mention of the effect of a judgment. This jurisdictional issue was the sole one involved in *Correa v. Barbour*, 71 F.2d 9; *Appalachian Electric Power Co. v. Smith*, 67 F.2d 451; and *Stone v. Interstate Natural Gas Co.*, 103 F.2d 544; there are quotations from cases like *United States v. Lee*, supra, but no mention whether prior suits were conducted by the Attorney General or the effect thereof.

ESTOPPEL: THE UNITED STATES IS LIKE ANY OTHER LITIGANT

Doubtless because the term "collateral estoppel" contains the word "estoppel," appellant (Br. fn. 24) asserts that the United States cannot be estopped by acts of its officers. This is not only playing with words, but the rule is not so broad. The rule is merely that the United States may not be estopped by acts of agents in entering into agreements to do what the law does not authorize them to do. As said by Dean Pound, 58 Harvard Law Review 922, 923, "where the federal government or a state goes into a court of equity and seeks relief, when it seeks equity it must do equity and so be subject to the doctrine of estoppel like any other litigant," particularly where, as here, it acts in a proprietary capacity.

We note again the passage quoted at p. 50, *supra* from *American Propellor & Mfg. Co. v. United States*, 300 U.S. 475. Quoting it, *United States v. Standard Oil Co. of California*, 21 F. Supp. 645, 655 states:

"With all due regard for the powers and attributes of sovereignty, it is well to remember that, when a sovereign comes into a court of equity seeking its aid to enforce its rights, even as the owner of the public domain, its claim should be tested by the same equitable principles which govern suits between private litigants, unless there be a special statute commanding a contrary rule. [Citations omitted]"

The United States was held by this Court to be estopped in *United States v. Coast Wineries*, 131 F.2d 643, 650. In *Vestal v. Commissioner*, 152 F.2d 132, 136 (D.C. Cir.), it is said that in proper circumstances the doctrine of estoppel does apply to the government, citing numerous cases.*

*E.g., *United States v. Brown*, 86 F.2d 798 (6 Cir.); *Staten Island etc. v. United States*, 85 F.2d 68 (2 Cir.); *Joseph Eichelberger & Co. v. Commissioner*, 88 F.2d 874; *Ford Motor Co. v. United States*, 9 F. Supp. 590, 604; *Ritter v. United States*, 28 F.2d 265 (3 Cir.): "when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations."; *United States v. Stinson*, 125 Fed. 907: "The substantial considerations underlying the doctrine of estoppel apply to the government as well as to individuals."

In *State of Iowa v. Carr*, 191 Fed. 257, 266 (8 Cir.) (before Sanborn, J., and Van Devanter, J., later a United States Supreme Court Justice), it was said:

"The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances,"

citing numerous authorities, including *Herman on Estoppel*, Sec. 676, 677. Herman states that the principle of non-estoppel as respects the government

"may be applicable in cases where an officer exceeds his authority or acts without power. But as a general principle applicable in all cases it is directly opposed to the great weight of authority on the subject."

In *United States v. Denver & R. G. W. R. Co.*, 16 F.2d 374 (8 Cir.), the court said (p. 376):

"The equitable claims of the state or of the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim. *State of Iowa v. Carr* (C.C.A.) 191 F. 257, 266; *United States v. Chandler-Dunbar Water Power Co.* (C.C.A.) 152 F. 25, 41; *United States v. Debell* (C.C.A.) 227 F. 775, 779; *Rannels v. Rowe* (C.C.A.) 145 F. 296, 301; 1 Pom. Eq. Jur. sec. 451."*

F. Neither the Supreme Court Nor Any Other Court Has Held That the Judgment in the District of Columbia Litigation Is Not Binding on the United States.

Lacking support in reason or principle, appellant relies chiefly on the reiterated assertion that the Supreme Court and other courts have held that the judgment in *Dollar v. Land* is not conclusive on the United States.

*Even in international tribunals, estoppel against the sovereign is recognized. 3 Stanford Law Review 193.

This is not so. To assert it is to attribute to the courts the act of gratuitously deciding matters not briefed, not argued, not submitted, and not involved in the issues before them.

Principally, appellant relies on statements made in 1947 in *Land v. Dollar*, 330 U.S. 731. But, as we have said, the collateral estoppel arose solely by reason of facts thereafter occurring, facts which were not and could not have been before the court, because they were not yet in existence. To avoid repetition we adopt what we said at pp. 20, 21, 31-34, *supra*.

No more did the Supreme Court pass on the question in *Land v. Dollar*, 341 U.S. 737. What was before it then was a motion to vacate a stay of the contempt judgment of the District of Columbia Court of Appeals, and the suggestion by Mr. Justice Jackson that the end of the term be postponed to permit early argument. The court gave reasons militating against what it termed premature disposition of the issues presented, and in the course thereof it stated, purely by way of an historical recital, what it had said in 330 U.S. 731. It did not decide, it did not even purport to decide, the issues of *res judicata* or *collateral estoppel*, neither of which was before it. In the very next breath it noted that (p. 379)

"On June 1, 1951, the District Court for the Northern District of California began its hearing on defendants' (respondents in this Court) motion to dismiss the complaint and for summary judgment."

Obviously the court did not purport to rule on that motion or to foreclose it.*

The question whether the judgment would be conclusive against the United States by virtue of the control of the case by the Attor-

*Appellant's brief (p. 15) also notes that in a separate memorandum, Mr. Justice Frankfurter refers to the fact that the Department of Justice had represented defendants throughout. This is no indication that he thought the fact to be of no significance. The contrary would seem to be true; he prefaced his separate memorandum with a statement why an explanation for granting certiorari was desirable.

ney General is one which has never come before the Supreme Court.*

Appellant states (Br. 14) that throughout the Dollar litigation the Supreme Court and the Court of Appeals for the District of Columbia have been aware that the defendants were being represented by the Department of Justice. A court's awareness of a fact not relevant to any issue before it cannot remotely mean that the court has decided the issue. In 1947, at the time of its opinion in 330 U.S., the facts on which the issue of collateral estoppel arises did not even exist. In 1950 and 1951, when the Court denied certiorari three times, the issue was not involved in the petitions. Nor was it presented in the petitions connected with the contempt proceedings which it granted. Its denials and grants of writs have no significance on the issue.

Appellant (Br. 15) notes that in briefs filed by us in opposition to petitions for certiorari in Nos. 552 and 697 (Oct. Term 1950) and No. 247 (Oct. Term 1951), we mentioned facts upon which the present claim of collateral estoppel rests. From this it apparently argues that thereby the issue was presented and decided. This is patently not so, as a brief review will show.

In No. 552 the government was petitioning for certiorari to review *Land v. Dollar*, 188 F.2d 629, the decision of January 31, 1951. At that time the present suit had not yet even been filed. The petition protested that the judgment was not *res judicata* against the United States. We said in reply that *that question was not before the court*, and, that whether the assertion was true or false, it was irrelevant. We further said that the question could only arise if the Attorney General should institute a new suit in the name of the United States, and that it was in-

*Appellant's brief (p. 10) also refers to a statement in the Chief Justice's opinion of April 17th where, as a single Justice, he stayed a restraining order issued by the Court of Appeals pending certiorari. The Chief Justice merely purported to give a brief resume of the history of the case. He did not purport to decide the issue of collateral estoppel. As a single justice his authority extended no further than to grant a stay. 28 U.S.C. Sec. 2101(f).

conceivable that he would institute such a suit, because to do so would be an act of intransigence and oppression.*

The government's petition in No. 697 related to phases of the order enforcing the judgment and to phases of the contempt proceeding. Our brief in opposition was filed May 10, 1951, before we had filed our answer in the instant cause or our motion for judgment.

The government based its argument on the premise that the judgment was "not *res judicata* against the United States. We replied that were this so, it would be irrelevant to the issue there involved.† And we said that the issue of *res judicata* "will arise

*What we said was this (p. 17):

"But the petition protests that the determination is not *res judicata* as against the United States. *Whether that is so is not a question now before the court. And whether true or not it is irrelevant.* The statement that the decision is not *res judicata* against the United States means no more than this: if the United States should see fit to bring a suit in its own name against the present plaintiffs to quiet title, it would not be foreclosed *on the threshold* by the present judgment. Yet, as a practical matter, such a suit would be fruitless, for, after all, the issue *has* been tried. More than that: * * * the Attorney General did take charge, and from first to last the case has been tried and conducted by him and those under his supervision. The trial was long, the record exhaustive. All possible evidence was introduced. It was almost entirely stipulated and documentary.

"The admitted facts, which in all honesty would have to be conceded in any new action, would compel judgment for plaintiffs in a new suit as they have in the old. The institution of a new action by the Attorney General, this time in the name of the United States, would be, in the circumstances, an act of intransigence and oppression, even if technically such a suit would not be barred by the doctrine of *res judicata*."

Then in a footnote we added:

"If the question of *res judicata* *should* arise in some proceeding, there are facts which occurred *after the decision in Land v. Dollar*, 330 U.S. 731, which would bear on the question, e.g., the Department of Justice tried and handled the case, a material fact under the principles stated in [authorities omitted] * * *."

†We said (p. 19):

"The argument which petitioners now make rests entirely on the premise that the judgment is not *res judicata* as respects the United States. Were *this so*, it would still be utterly irrelevant, as the court below, in its powerful opinion of April 11, 1951 demonstrates. That opinion proceeds on the assumption that the judgment is not *res judicata* against the United States. Our discussion proceeds on the same assumption, although we believe that the determination that the 1938 contract was a pledge is conclusive against the United States * * *."

in the San Francisco suit when the defense is pleaded, but it has not yet arisen here" (p. 19).^{*} Thereafter the defense was pleaded in the San Francisco suit. Then, for the first time in any court, it became an issue, for the first time, it was fully briefed and argued, and for the first time decided.

The petition for certiorari in No. 247 sought review of the contempt judgment on the ground that it proceeded on the premise that "the District of Columbia * * * litigation adjudicated the rights of the United States to the stock". We said in reply (p. 9), just as we had responded to similar claims in previous petitions, that "the order proceeds on no such premise". We added:

"Of course, if the basic judgment, which this Court has thrice declined to review, concludes the United States, the ground on which petitioners base their resistance to the judgment disappears. Consequently, should a writ be granted, we shall ask the Court to hold that the United States is concluded on the principles of collateral estoppel."

And we noted that the argument would be based on facts occurring subsequently to *Land v. Dollar*, 330 U.S. 731, adding, "Such facts . . . have never yet been brought before this Court for consideration."

By granting the writ the court did not rule against a contention yet to be briefed and presented and which could be presented only if the writ were granted.[†]

Appellant would also have it appear that the Court of Appeals for the District of Columbia has held that the judgment in *Dollar v. Land* was not binding on the United States. That is not so. As part of repeated objections, first to the form of judgment and then to its enforcement, the Department of Justice argued that it was

^{*}In a footnote we said:

"Lest there be any claim *when the issue does arise* that we have acquiesced, we briefly review our position in this footnote."

[†]Appellant's brief also argues (fn. 14, p. 16) that because the Supreme Court on January 7, 1952 denied our petition for certiorari in the present cause it disapproved of the final decree below. The petition sought certiorari *before* decision by this Court. The denial meant nothing except that the court preferred the case to follow the usual course. If any significance could be attached, it would be that the court approved the judgment.

not binding on the United States. The court's consistent answer was that the objection was pointless, because, assuming the premise to be well taken, the judgment was nevertheless enforceable to give the plaintiffs possession. For example, appellant quotes from *Land v. Dollar*, 190 F.2d 366 (April 11, 1951). There the court, responding to the argument that plaintiffs could not enforce their judgment, referred to what the Supreme Court had said, pointed to *United States v. Lee* as the source of the statement, and then went on to show that under that case plaintiffs were entitled to possession regardless of the claims of the United States.

The court was not purporting to pass on the issue of *res judicata*. It made this doubly clear in its latest opinion (May 18, 1951) (*Land v. Dollar*, *Sawyer v. Dollar*, 190 F.2d 623, 645, 646) where it said:

"And it is indisputably true that the claim of the United States to title is immaterial to the claims of Sawyer, et al., respondents in this suit, to possession. Thus, this discussion of the *non res judicata* rule and the impact of the Government's course upon the doctrine of sovereign immunity is *outside the scope of any issue before us.*"*

The court also pointed out that the issue could only arise *if it should be pleaded by the Dollars in a suit brought against them by the United States.*

Appellant (p. 11) quotes from *Land v. Dollar*, 188 F.2d 629 (January 31, 1951). There the court was merely explaining that the judgment should be cast in the form of a decree for possession. The Dollars did not contend that the decree should be in any other form. They merely argued that, since the defendants were individuals, they had no standing to object, and that the separate appeal of the United States, *eo nomine*, had to be dismissed because it was in a dilemma: If it was not bound, as it

*Appellant (p. 13) quotes a passage from this opinion. But in it, in noting why the argument that the judgment was not *res judicata* was not relevant to any issue before it, the court merely described what a rule of *non-res-judicata* would mean. It did not say that such a rule applied here.

claimed, it had no standing to appeal; if it had a standing to appeal, it was bound. In our memorandum supporting that motion we submitted that "It is unnecessary for the court to decide whether the United States is or is not bound by the judgment, for in either event the appeal must be dismissed."*

Appellant quotes another passage from the April 11, 1951 opinion (190 F.2d 366, 375) but fails to note what immediately follows:

"The claim as presently presented is a patent prostitution of a principle of high public importance, which is that the Government may not be sued without its consent lest a mass of unimpeded litigation interfere with the performance of government functions."†

Even more extraordinary is appellant's claim that this Court—the Ninth Circuit—has held that the judgment in *Dollar v. Land* is not conclusive. If there is any court before whom that issue has not yet come and to which it has never been briefed or argued until now, this is the court. And we do not suppose that it essayed a decision of a question neither presented, briefed or argued.

Appellant quotes from this Court's opinion of June 22, 1951, *Dollar v. United States*, 190 F.2d 547, the sentence, "Nor do we understand that it is argued that the United States may not prosecute that action." What was then before the court was our motion to stay a preliminary injunction pending appeal from it. The court was not even ruling on that appeal but only on the motion for a stay.‡

*Page 9, Transcript of Record, Supreme Court, No. 552. This transcript is before this Court, having been admitted to be true (see p. 9, *supra*).

†Note also that what the court says in the quoted passage completely supports the other ground on which our judgment was granted in the court below, that is, lack of a genuine issue of fact—"In the present instance the right involves nothing of undetermined substance." (see pp. 61-96, *infra*).

‡At page 5, fn. 4, appellant's brief says that on January 10, 1952 this Court dismissed that appeal. True, it did so, but on *our* own motion, because the appeal had become moot, the final judgment having dissolved the preliminary injunction.

In the quoted sentence the Court was referring to our position as to the right of the United States to prosecute the action. That position was clear: Since the United States was not a party *eo nomine* in the District of Columbia litigation, a mere showing of the judgment would not stop the United States *on the threshold*, it would be necessary to go further and in some appropriate way plead and show the additional facts on which the collateral estoppel rested, and at a proper time and place, if it ever became necessary, we would do so. (See discussion at p. 8, *supra*.) Exactly that had been stated to the Supreme Court (see footnote at p. 56, *supra*) and in the record before this Court at the time of its June 1951 opinion. Pertinent portions of that record are in the record here. For example (R. 65):

"... our adversaries ... rely on ... the statement in the opinion of the Supreme Court that the judgment to be rendered would not be *res judicata* of the United States. But all that this means is that, since the United States could not be made a party and therefore was not a party *eo nomine*, it may be at liberty to file a suit in its own name, *just as any natural person might do in like circumstance* to assert whatever right it might wish to assert, *and in such a suit it could not be said, from the bare face of the judgment alone, that it is barred by the judgment on the threshold of the new suit.*"

And we added that on the basis of the further fact that the Attorney General had defended the case, the defense of conclusiveness of the judgment *would be presented at a proper time by a proper motion*, as by motion for summary judgment, as would other grounds for dismissing the complaint (R. 65, 71, 76, 77).

In its opinion of June 1951 this Court then posed, as one of the questions which would *later arise but which it was not then deciding*, this: "If the United States may prosecute the action, may it prosecute it as effectively as if there had been no prior litigation between *Dollar* or *Land*, or their successors?"

Furthermore, in all the court opinions noted above the references are to *res judicata*, none to the doctrine of collateral estoppel. In 65 Harvard Law Review at 476 it is said:

"Although each court handling the *Dollar* case said that the judgment would not be 'res judicata' against the United States, they seem to have meant that, not having been a party, it would not be prevented from bringing a later action, but do not seem to have intended to foreclose a later determination of what issues might be raised in such an action. The term 'res judicata' seems therefore to have been used as an equivalent to 'merger' or 'bar' as used in the *Restatement of Judgments*. The related rule of collateral estoppel affects one 'who is not a party but who controls an action,' and binds him 'by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest . . . in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction.' The principle behind both this rule and merger or bar is that repeated trials of an issue with the same evidence can only burden the courts and the litigants."

Until now there has never been a case where, after suit had been brought under the principles applied in *Land v. Dollar*, 330 U.S. 731, the government has not acquiesced in the judgment of a federal court as conclusive of the issue of title of the United States. It seeks to do so now.

We submit that neither justice, equity, law nor morals countenance the effort.

II.

NO GENUINE ISSUE OF FACT EXISTS, THE UNDISPUTED AND ADMITTED FACTS ESTABLISH THAT THE 1938 TRANSFERS WERE A PLEDGE, AND THEREFORE A SUMMARY JUDGMENT WAS PROPERLY ENTERED FOR APPELLEES.

The Department of Justice seeks to retry the issue on the theory that the judgment in *Dollar v. Land* does not conclude it because it has changed the name of its client. But quite apart from con-

clusiveness of the judgment, the motion for summary judgment was still properly granted.

The defense presented in Part I of this brief rests on (1) the District of Columbia judgment, plus (2) the fact of control of the litigation by the Department of Justice in the interest of the United States. The defense now to be discussed goes behind the judgment to the record of that case and of this.

No court can be expected to engage in a trial of a *feigned and spurious issue*. The procedure of summary judgment was designed to dispose of litigation where there is no genuine issue of fact. *R.C.P. Rule 56*. As said in *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 472, 473 (2 Cir.):

“* * * The federal summary judgment proceeding is the most extensive of any jurisdiction * * *. the history of the development of this procedure shows that it is intended to permit ‘a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried.’ ”

See also this Court’s decision in *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196, 205 (9 Cir.).

As said in *United States v. Maryland Casualty Co.*, 147 F.2d 423, 425 (5 Cir.) (1945), “Summary judgments are looked upon with favor, and they will be upheld unless there is some genuine issue of fact presented.”

This Court has frequently upheld them and has done so in cases involving long records. Cf. *Burnham Chemical Company v. Borax Consolidated, Ltd.*, 170 F.2d 569, *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, supra, and cases cited therein.

A. The Court of Appeals for the District of Columbia Has Demonstrated That There Is No Genuine Issue of Fact.

The contention that the transfer of 1938 was outright has no substance. In *Land v. Dollar*, 190 F.2d 366 (April, 1951) the Court of Appeals for the District of Columbia, although assuming for the argument that its judgment was technically not *res judicata* against the United States, said (p. 375):

"The question whether the United States is the owner of this stock has been presented to the courts and has been decided. The only basis thus far presented for the claim that the United States owns the shares is that the transaction in 1938 was an outright acquisition and not a pledge. *That issue has been adjudicated to a final conclusion in a judicial proceeding in which the issue was properly before the court.* We say 'a final conclusion' because surely an issue which has been considered three times by an appellate court and three times by the Supreme Court ought to be finally concluded. In that proceeding officials claiming to act as agents of the United States in respect to these shares were parties. The Attorney General of the United States, through his deputies and assistants, was counsel. The United States appears to seek to assert *nothing of substance which has not been asserted and adjudicated.*"

Previously, when that court decided the case on the merits in July 1950, it said (*Dollar v. Land*, 184 F.2d 245, 253 (2d col.)):

"It seems *plain beyond question* that if this transfer had occurred between two private individuals *no court of equity would have treated the transfer of the shares as other than a pledge.*"

Again it said (p. 256, 2d col.):

"*Any other conclusion*, if the transaction were between private parties, *would be wholly untenable* in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party."

Again, it described the contrary contention as "fallacious logically" (p. 257, 1st col.).

The Court of Appeals thereupon reversed *and set aside a finding by the District Court* that the transfer was one of out-right ownership.

The full meaning of the Court of Appeals' ruling appears in sharp relief by recalling the limits of the power of an appellate court to set aside findings of a trial court and to substitute its own. That power is confined in the extreme. It may not be exercised merely because an appellate court disagrees with the findings. It may be exercised only if the findings are "*clearly erroneous*". R.C.P. Rule 52.

As this Court itself has said, before a finding may be set aside, it must be unsupported by "substantial evidence". *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 548 (9 Cir.). As said again by this Court in *United States v. Foster*, 123 F.2d 32, 34 (9 Cir.), the record must be such "as would *compel* an overthrow of the findings made below." See also *Grace Bros. v. C. I. R.*, 178 F.2d 170 (9 Cir.). Or as said in *Anderson v. Federal Cartridge Corporation*, 156 F.2d 681, 684 (8 Cir.), the appellant must sustain the burden of showing that "the evidence *compelled* a finding in his favor."

As this Court has often said, an appellate court will not substitute its interpretation of a contract for that of a trial court, if the latter is tenable. *Portland Cement Co. v. Food Mach. & Chem. Corp.*, *supra*, at 553; *Quon v. Niagara Fire Ins. Co.*, 190 F.2d 257 (9 Cir.).

With these rules in mind, it is evident that the Court of Appeals ruled that the record **compelled** the conclusion of a pledge. *The United States Supreme Court denied certiorari* (340 U.S. 884), and it denied a petition for rehearing to review the same issue on March 12, 1951 (340 U.S. 948).

A "genuine issue", as the term is used in summary judgment procedure, is one which can be maintained by "substantial evidence". *Firemen's Mutual Insurance Co. v. Aponaug Mfg. Co.*, 149 F.2d 359 at 362 (5 Cir.). Yet, as the Court of Appeals has said, there is no substantial evidence to support a finding of out-right transfer.

B. The Case Rests on the Identical Record as the District of Columbia Judgment.

The record on which the District of Columbia judgment rests is the identical one on which the present case was decided. That record was brought into the case in support of the motion for judgment by appropriate means. Not only was it proved to be the record, but the facts contained in it were established by admissions of their truth in response to requests for admissions of fact (see pp. 10-12, *supra*)* Appellant made no showing at all. Thus the record in *Dollar v. Land* became the record here.

Appellant concedes that the records in the two cases are the same. For example, it inquires (Br. 41): "How could a record which the District of Columbia Court of Appeals found presented a substantial issue of fact when it was before that court become a record not presenting a substantial issue of fact when before Judge Murphy?" But that Court of Appeals held that the record presented no substantial issue of fact. On no other basis could it have reversed. And so we rephrase the question: "How can a record involving no genuine issue of fact when it was before that Court of Appeals involve such an issue when before the court below?"

C. Where a Court of Appeals Has Ruled That a Given Record Requires a Given Conclusion, a Summary Judgment Accordingly Is Proper in Another Case on the Same Record.

Since a finding that the transfer was of outright ownership *had* to be reversed, in the opinion of one of the highest courts in the land, sustained by the Supreme Court, *a fortiori* no *genuine* issue of fact is presented on that record, and a summary judgment must be entered.

*Appellant remarks (Br. 36, fn. 28) that this is not the complete record in *Dollar v. Land* but only those parts that counsel, including appellant's present counsel, saw fit to print for use of the District of Columbia Court of Appeals. Obviously, the Department of Justice omitted nothing relevant from that printing. And if appellant's counsel thought some portion omitted from the Joint Appendix was pertinent, he should have brought it before the court below by affidavit in opposition to the motion for judgment, just as appellee's counsel did with certain portions in support of the motion (see p. 9, *supra*).

This conclusion has nothing to do with whether or not the judgment in *Dollar v. Land* is *res judicata* here or binding under principles of collateral estoppel. In *Vail v. Arizona*, 207 U.S. 201, suit had been brought against county supervisors. The same issue had been decided in a previous case against a certain loan commission. The court held that the issue was settled, saying:

"* * * In the two cases, 172 and 186 U.S. in which the validity of the refunding legislation was considered, Pima County was not nominally a party. The actions were brought by the holders of the bonds against the loan commission. Whether the county was technically bound by the decisions may be a question. It was heard by its attorney in the litigation, and was the party ultimately to be affected by the refunding. *Gunter v. Atlantic Coast Line*, 200 U.S. 273. But if it be not so bound, still under the doctrine of *stare decisis* the question should no longer be considered an open one" (p. 204).

The Court of Appeals for the District of Columbia applied the identical language to the government's present attempt to relitigate. It said in May 1951 (*Sawyer v. Dollar*, 190 F.2d 623, 647):

"Respondents seem to exaggerate the effect of the doctrine of *non res judicata*. The doctrine does not mean that the judgment is invalid or incomplete. The judgment is *stare decisis* even though not *res judicata*."

Upon the same record the same result should follow. *Prout v. Starr*, 188 U.S. 537.

If *Dollar v. Land* had been litigated through *this* Circuit, and *this* Court had written the opinions and rendered the decisions written and rendered in the District of Columbia, it would be sheer impudence to ask the District Court laboriously to receive, by formal trial, the same record, to blind itself to the analysis and scrutiny that had already been given to it, to retread it in aloof solitude, only to come out, as it must, at the same conclusion.

Leishman v. Radio Condenser Co., 167 F.2d 890 (9 Cir.), *cert. den.* 335 U.S. 891, a decision of this Court, is directly in point. Leishman had sued Associated alleging infringement by Crosley

radio tuners of a certain patent. On appeal this Court held that the patent's claims were not infringed. Later two other tuner manufacturers, Condenser and General, sued Leishman for a declaratory judgment that his patent was not infringed by their tuners. This Court affirmed a summary judgment for General and Condenser, saying (p. 892):

"It is true that the pleadings, without the affidavits, showed that there was an issue as to a material fact, namely, an issue as to whether the claims were infringed by the Condenser tuners and the General tuners. However, one of the supporting affidavits * * * stated, in substance, that the Condenser tuners and the General tuners did not differ materially from the Crosley tuners. The statement was not controverted and hence was accepted by the * * * court, and is accepted by us, as correct. In view of our decision in the Associated case, holding that the claims were not infringed by the Crosley tuners, the * * * court correctly concluded that, in the case at bar, the issue as to whether the claims were infringed by the Condenser tuners and the General tuners was not a genuine issue."

That was a case where the judgment in the earlier suit could not conceivably have been binding in the later litigation by virtue of *res judicata* or collateral estoppel, since the manufacturers were different and had no part in the conduct of the first litigation. Nevertheless, the judgment in the previous case was held to be a proper basis for summary judgment.

That is a common-sense decision, and it sweeps aside the vast bulk of appellant's arguments. Realizing this to be so, appellant argues that this Court is not "bound" by what the Court of Appeals for the District of Columbia has ruled (Br. 41). Apart from collateral estoppel, that is true, since the two courts are of equal rank.

But the truism misses the essences of the matter. One of the essences is that on the identical record one of the highest courts in the land has held not only that the very transaction here involved was a pledge, but *that no court of equity could hold otherwise.*

If the transaction in *Dollar v. Land* were not the same as that here involved but merely a similar transaction,—if the record were not identical but merely similar—the decision would be considered as tremendously persuasive authority. But here the transaction and the records in the two cases are identical.

The federal courts are “many members yet but one body” being “arms of the same sovereignty”, *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F.2d 82, 86.

Whatever a court may do with respect to following decisions of other circuits in other circumstances, the rule of comity has prevailed when the earlier decision in another circuit deals, as here, with the application of well settled legal principles to particular facts. Certainly this is so where the facts in both cases are identical and undisputed, as here. If on the same record and the same issue different results should follow, the federal judicial system would fall into chaos.

In *Ball v. Chapman*, 1 F.2d 895, the Seventh Circuit followed a decision of the Second Circuit in a suit by the same plaintiff against certain persons who were associates of defendant in the later suit, arising out of the same transaction. It said (p. 896):

“We are asked to first determine what weight should be given the decision of a court of coordinate jurisdiction, where the legal question is not only similar, but arises out of the same facts, the same transactions, and wherein the plaintiff in each suit is the same, and the parties defendant, in the suit that is ended, were some of the alleged tortfeasors who, with the defendant in the present suit, practiced the alleged fraud. While fully recognizing that such prior decision of the coordinate court is not conclusive upon us, it is manifestly entitled to great weight; and this is so, not only because of the respect we entertain for the opinions of these courts, but because such a policy tends to secure uniformity of ruling, and at the same time terminates litigation which otherwise might be well-nigh endless.”

In *United States v. Freeman*, 37 F. Supp. 720, a *summary judgment* was granted against stockholders of a bank in a suit in the District of Massachusetts following decision of the same issue in another circuit against other stockholders. The court said (p. 724):

"The Circuit Court of Appeals for the Seventh Circuit, in *Reconstruction Finance Corporation v. McCormick* * * * held [so and so]. The Supreme Court * * * denied certiorari.

"In view of this situation, the Illinois litigation must be deemed to have settled the law applicable to the facts of this case. It would be presumptuous for this court to adopt views incompatible with the conclusion reached.

"It follows therefore from the foregoing that the plaintiffs' motions cannot be defeated because of the existence of a genuine issue as to a material fact, nor because of the validity of any of the defenses raised in the pleadings."

In *General Motors Corporation v. Leishman*, 85 F. Supp. 187, Judge McCormick (S.D. Cal.) dealt with a patent which had been held to be invalid in the Tenth Circuit in a decision where the Supreme Court denied certiorari. Noting these facts the court said:

"Thus the questioned claims involved in this action have been held by a federal appellate court of superior authority to ours to involve no invention, and while the decision of the appellate court in the Tenth Circuit * * * does not operate to control us in this action * * * we think, however, that *the appellate decision in the Tenth Circuit having been based upon substantially the same record as made herein*, we should and do consider such decision as highly persuasive * * *. This, we think, is manifestly the correct position for us to take in the light of the unanimous confirmatory decision of the Tenth Circuit Court of Appeals on rehearing as shown in the reported decision whereby it again rejected the contention that invention is found in the patent claims in controversy" (p. 188).

The quotation is remarkably apt, since the Court of Appeals for the District of Columbia has repeatedly confirmed its deci-

sion here, and the Supreme Court has repeatedly denied certiorari on the merits.

In *United States v. Weil*, 46 F. Supp. 323, 325, it is said that if a decision of another circuit is unanimous, "it would be the duty of this Court to follow it" unless it is "clearly erroneous." The same principle is stated in *The Bleakley No. 76*, 56 F.2d 1037.

Where the United States Supreme Court has three times denied certiorari, it would be idle to assert that the decision of the Court of Appeals for the District of Columbia is erroneous, much less clearly so.

See also *Topas v. National Shawmut Bank*, 53 F.2d 1020, and 21 C.J.S. 349.

D. The Claim That the District Court Denied Appellant the Right to Make a New Record Is Spurious. Appellant Simply Made None.

Perhaps the major burden of appellant's brief is its reiterated complaint that the District Court denied it the chance of making a different record, introducing different evidence, or making a case (cf. Br. 34, 42, 45, 53). *There is not a spark of truth to this complaint.* The District Court denied appellant no opportunity. It had the same opportunity as any litigant to show the existence of a genuine issue, when a motion for summary judgment is made. But, as the District Court states (R. 288):

"In response to this showing the Government has done nothing. It has presented no opposing affidavits, no depositions, or counter admissions. Although in oral argument it hinted at some 'other evidence,' it failed to produce it in response to the motion. Obviously, the whole purpose of the summary judgment procedure would be defeated if a case could be forced to trial by merely contending that an issue exists, without any showing of evidence. * * *"

And again (R. 290):

"The Government, by inaction, has joined the issue on the former record * * *."

As stated by this Court in *Gifford v. Travelers Protective Association*, 153 F.2d 209, 211 (9 Cir.), where a party moves for summary judgment and places before the court, as we did here, the material facts which would entitle him to judgment,

"and which the plaintiff does not discredit as dishonest, it rests on the plaintiff, in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result."

The opposing party must show, by the procedures prescribed by R.C.P. Rule 56, how he will support his contention that a genuine issue is present. *Egyes v. Magyar Nemzeti Bank*, 165 F.2d 539 (2 Cir.). He cannot simply assert, darkly, that he has other evidence. He must submit that evidence to the court, and it must be of a nature as could create a genuine issue. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2 Cir.); *Gray v. Amerada Petroleum Corporation*, 145 F.2d 730 (5 Cir.); *Chandler Laboratories v. Smith*, 88 F. Supp. 583. In the *Aetna* case the Second Circuit said:

"* * * Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. * * *

"In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence, which she is now holding back * * *. If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise substantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions" (p. 473).

Appellant seeks to evade its failure to make a counter-showing by arguing (Br. 36) that the moving party has the burden of showing the absence of a genuine issue of fact. But, as stated in 3 *Barron & Holtzoff*, Federal Practice and Procedure, Sec. 1235, p. 88, when the moving party

"has made a *prima facie* showing to this effect the opposing party cannot defeat the motion for summary judgment and require a trial by a bare contention that an issue of fact exists. He must show that evidence is available which would justify a trial of the issue."*

Appellant also seems to claim that the mere assertion in the complaint of title was enough to defeat a motion for summary judgment. This Court has more than once rejected this contention that the averments of a pleading can defeat the motion, for such a rule would destroy the summary judgment procedure entirely. *Lindsey v. Leavy*, 149 F.2d 899 (9 Cir.); *Piantadosi v. Loew's, Inc.*, 137 F.2d 534 (9 Cir.); *Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9 Cir.) at 205; *Leishman v. Radio Condenser Co.*, 167 F.2d 890 (9 Cir.); *Christianson v. Gaines*, 174 F.2d 534, 536 (D.C. Cir.).

Appellant then argues that here its complaint was verified (Br. 47). The fact is irrelevant. A verified complaint may serve as an affidavit in opposition to a motion for summary judgment, but only if it conforms to the requirements of Rule 56. The verification here was by one of appellant's attorneys, "Donald B. MacGuineas, attorney, Department of Justice." Mr. MacGuineas has no personal knowledge of the 1938 transfers, and does not show that he would be competent to testify, as Rule 56(e) requires. *Piantadosi v. Loew's, Inc.*, *supra*.

*Appellant argues that in some cases summary judgments were held to be improper although no opposing showing was made (e.g., Br. 47). Obviously, if the showing made in support of a motion is inadequate, no opposing showing is necessary. But it is absurd to liken this case to such as that.

MERE ASSERTION CANNOT SUFFICE

Appellant asserts that it informed both District Judge Harris, on the motion for preliminary injunction, and District Judge Murphy, on the motion for summary judgment, that "The Government is prepared to offer on the trial of the case new evidence" (Br. 49). But, as just seen, mere claims will not do. Before Judge Harris counsel did not even specify what new evidence he had or how it could possibly be material.* Counsel had merely said,

"I assert to Your Honor right now the Government has new evidence not presented in the District of Columbia action which it will present upon the trial of this case." (R. 70)

Over two months later, when the motion for summary judgment was being argued, and when it was counsel's duty to make his assertion good about the alleged new evidence which two months before he said he had "right now," he still had no showing to make and still made none.†

There never was any showing in any manner, either in that required by the Rules of Civil Procedure or in any other. The dark insinuations that appellant might have other evidence were never anything but a momentary excuse for the filing of the new suit.

In simple truth it is inconceivable that there could be any *material* evidence, relevant to the agreement and transfers of 1938, that was not introduced at the trial in *Dollar v. Land*. To suggest that there could be is to condemn the Department of Justice of shocking incompetence in handling that litigation. The record shows, without contradiction that the Department of Justice and counsel for the Dollars spent many months together upon a

*At that time no motion for summary judgment was even pending. Appellees had not yet filed their answer.

†Four months after that, when the motion for judgment had already been granted, some reference was first made to alleged new evidence, but purely by way of assertion in a memorandum in support of a motion for injunction pending appeal. We shall consider this at pages 76, 92-96, below.

mutual disclosure and discovery of evidence, made available to one another vast quantities of documents, so that each might determine what could be relevant, and concluded after this extensive search for documents, exploration of files, and mutual disclosures, in a long stipulation of facts. A certified copy of that stipulation is before this Court as Exhibit 1 to the Request for Admissions of Fact.*

The obvious truth is shown by the fact that when, in May 1951, the Solicitor General asked the Supreme Court the second time for leave to petition for reconsideration of *Land v. Dollar*, he stated to that Court that if it would decide the issue of pledge or sale, the government would be satisfied to have the case decided on the record there, would not care to relitigate with new evidence, and would drop the instant cause. Mr. MacGuineas, appellant's counsel here, told this Court the same thing on May 31, 1951.† Could appellant in good faith deny to the court below the completeness of the record which it asked the Supreme Court to accept and which it stated was wholly sufficient for a decision?

What the Court of Appeals for the District of Columbia said, in *Sawyer v. Dollar*, 190 F.2d 623, 646, is true:

"the new litigation [i.e., the present suit] pictured to us in these papers involves no new law, person or circumstance."

*The foregoing facts appear in Part III of an affidavit of Moses Lasky (R. 276-277). They are uncontradicted, but appellant apparently assails Mr. Lasky (Br. 46, 47). It asserts that the trial court rested on Mr. Lasky's statement that no new evidence was available. That, of course, is not the case. Mr. Lasky's statement did not rest upon itself but was an obvious and sound deduction from the uncontradicted *facts* stated of his own knowledge.

That statement did not prevent appellant, if it could, from demonstrating the deduction to be unsound. But to do so it was necessary to make a showing of new relevant evidence. Yet, as the trial court stated, after noting the uncontradicted fact that "in compiling the stipulation he [Moses Lasky] and representatives of the Department of Justice exhaustively sifted every existing shred of evidence," the Government had done nothing in response to the showing (R. 288).

†Transcript of Proceedings of oral argument on motion to stay preliminary injunction, May 31, 1951, pp. 18, 19.

And again (p. 645):

"* * * The United States does not allege that its claim now to be presented for adjudication in the new action involves any new or different point of fact or law. It merely claims that the judgment already entered by this court is in error."

And so the real reason for the effort to relitigate is disgruntlement with the decision of that Court of Appeals and hope for a different decision in another circuit (see p. 5, *supra*). But belief by defeated counsel that a court was wrong does not inject the quality of genuineness into a spurious issue.

**APPELLANT HAS NO VALID EXCUSE FOR
FAILING TO MAKE A SHOWING BELOW**

Appellant complains that it would have been "unreasonable" to expect government counsel to submit an affidavit detailing new proof to be adduced at a trial (Br. 48). Forsooth, why? Government counsel are subject to the same rules as private litigants. If more time was needed, *R. C. P. Rule 56(f)* provided the procedure to follow. That rule prescribes:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Where one fails to utilize *Rule 56(f)*, he may not on appeal from a summary judgment assert that it was unreasonable to expect him to make his countershowing. *Foster v. General Motors Corporation*, 191 F.2d 907 (7 Cir.); *Adkins v. E. I. du Pont de Nemours & Co.*, 181 F.2d 641 (10 Cir.). In the *Foster* case, where a summary judgment was affirmed, the court said (p. 912):

"Plaintiffs made no attempt to comply with this requirement, which raises a presumption, so we think, that they were unwilling to put in affidavit form a statement to the effect
* * *."

3 Barron & Holtzoff, Federal Practice and Procedure, p. 88, n. 16, states that one opposing a motion for summary judgment must show that evidence is available which would justify a trial, and adds:

"Rule 56(f) * * * provides protection for the opposing party who makes such contention *in good faith* but is not able to procure evidence to support it at the time of the hearing."

But appellant made no applications under Rule 56(f).

Obviously, if appellant truly had new relevant evidence when it filed the suit, as it so suavely asserted at the time, it would not have over-taxed the capacities and resources of the Department of Justice to prepare an affidavit. It now states in 4 pages its alleged new evidence (Br. 49-52), and all of it relates to documents. It would have been simple to attach photostat copies to an affidavit. But this would have let the papers speak, and it would have shown the claim of relevant new evidence to be spurious and sham (see pp. 91-96, *infra*).

And even were it true that an affidavit or affidavits of some length would have been required, that would be no excuse for making none. As said in *Hemler v. Union Producing Co.*, 40 F. Supp. 824, 834:

"I do not believe that the plaintiff can take the arbitrary position that because of the complicated nature of the case or the difficulty of showing the existence of facts in his favor, that he will simply * * * offer none of his own."

APPELLANT'S EFFORT IN ITS BRIEF TO GO OUTSIDE THE RECORD MADE BELOW IS IMPROPER

Appellant's brief now professes to list a number of items of new evidence (Br. 49-52). This is still *mere* assertion. And we shall show that the assertion is utterly empty (pp. 91-96, *infra*).

But apart from that, such assertions in an appellate brief have no standing. As said in *Foster v. General Motors Corporation*, 191 F.2d 907, 911 (7 Cir.):

"Obviously, this contention must be resolved *on the record as made*, and when viewed in this light plaintiffs are in a poor position to contend that there was before the court such an

issue. Some of such issues here urged were raised only in the brief which the plaintiffs filed in opposition to defendant's motion for summary judgment, others were raised for the first time in their briefs before this court."

The court held that nothing could be considered but the record presented to the District Court, consisting only of the complaint and answer, the motion for summary judgment, and defendant's showing in support thereof. The same is true here.

E. This Case Involved No "Battle of Affidavits" but Contains the Ideal Record for Summary Judgment.

Appellant's brief agitates the elementary principles governing summary judgments. Essentially its argument comes down to the dislike of courts for decisions based on a "battle of affidavits," where there has been no real opportunity to present the case in an adversary manner, and no real opportunity to subject the record to a close scrutiny by a court (e.g., Br. 35, 38, and cases there cited).

But there was no such battle of affidavits here. The vice in appellant's position is its blindness to these overriding facts:

1. Here the record, which was later made the record in this case, was produced in a case which has in fact been tried in an adversary manner.

2. The evidence was subjected to probing by opposing counsel, the very counsel conducting the present case.

3. The record thus produced was then plumbed, analyzed and subjected to critical scrutiny by a United States Court of Appeals, with the results of its analysis reduced to writing in an able opinion. And that record is the record now before this Court. Never before was a District Court so well favored in determining whether a genuine issue existed.

Kennedy v. Silas Mason Co., 334 U.S. 249, typical of authorities cited by appellant, is authority against it. There the court observed (p. 257) that the desideratum for exercising summary judgment jurisdiction was a record which presented a

"solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

But exactly that desideratum was present here in full measure. Not only has there been litigation resulting in a solid basis of findings, but, as we shall note, the record was, in overwhelming part, and in all relevant parts, an agreed statement of facts (pp. 11 *supra*; 80-87, *infra*).

In *Leishman v. Radio Condenser Co.*, 167 F.2d 890, discussed at p. 66, *supra*, this Court recognized that a decision by a Court of Appeals on an identical record is a controlling factor in exercising summary judgment powers.

Furthermore, an element that has largely influenced decisions respecting summary judgments is that the right to a jury trial should not be limited (so emphasized in *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, cited App. Br. 35). For example, while appellant quotes (Br. 44, 45) from *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, it deletes this passage: "It must not be forgotten that in actions at law, trial by jury of disputed questions of fact is guaranteed by the constitution."

But the present case is one in equity. A single judge passed on the record on the motion for summary judgment. And a single judge would have passed on it had it come in by formal trial. Appellant is fencing with form, not substance.

Where on motion for summary judgment the moving party brings before the court the facts that a formal trial would produce, and the conflict is as to the inferences to be drawn therefrom, the case is one for summary judgment. *Otis & Co. v. Pennsylvania Railroad Co.*, 61 F. Supp. 905, affirmed 155 F.2d 522; *McComb v. Southern Weighing and Inspection Co.*, 170 F.2d 526 (4 Cir.).*

Where the conflict in a case is as to the conclusion to be drawn from undisputed facts, a summary judgment should be ordered. *Fox v. Johnson & Wimsatt*, 127 F.2d 729, 736, 737 (D.C. Cir.) by Rutledge, J., later on the United States Supreme Court).

*The rationale of the rule is the same as for the principle that where decision rests on ultimate inferences and conclusions from the evidentiary facts, an appellate court is not bound by those drawn by a trial court. *Sun Ins. Office, Ltd. v. Be-Mac Transport Co.*, 132 F.2d 535 (8 Cir.); *Kuhn v. Princess Lida of Thurn & Taxis*, 119 F.2d 704, 705-6 (3 Cir.

**THE FACT THAT THE GOVERNMENT IS INTERESTED DOES NOT
MAKE SUMMARY JUDGMENT LESS APPROPRIATE**

Appellant finally argues that in a case involving "complex issues of public importance" a summary judgment is inappropriate (Br. 53). It is sufficient to reply that the issue whether the contract of 1938 was a sale or pledge is *not* of public importance. As said in *Land v. Dollar*, 190 F.2d 366 at 375:

"The ownership of these shares of stock is not a high function of government; it would be at the most an operation by the Government in a commercial field. The Government officials before us are not here defending the right and duty of the Government to govern; they are asserting its right to own shares in a *purely private commercial enterprise*."

Nor is the issue novel or complex. The question whether a transfer is a pledge or sale often arises between lender and borrower. It is an old head of equity jurisdiction. As the District of Columbia Court of Appeals has said, *Dollar v. Land*, 184 F.2d 245, 256:

"Any other conclusion, if the transaction were between private parties, would be wholly untenable in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party."

And it is settled that summary judgment may be entered against the government. *United States v. Maryland Casualty Co.*, 147 F.2d 423 (5 Cir.); *United States v. William S. Gray Co.*, 59 F. Supp. 665.

F. Appellant's Charge That the District Judge Was Derelict in the Duties of His Office Is Unwarranted.

Appellant charges that the District Court made no independent examination of the record and did not formulate its own con-

1941); *Carter Oil Co. v. McQuigg*, 112 F.2d 275, 279 (7 Cir.); *Western Union Telegraph Co. v. Bromberg*, 143 F.2d 288 (9 Cir.); *United States v. Anderson*, 108 F.2d 475, 478-479 (7 Cir. 1939); *Himmel Bros. Co. v. Serrick Corp.*, 122 F.2d 740 (7 Cir.); *Murray v. Noblesville Milling Co.*, 131 F.2d 470, 474 (7 Cir. 1942).

struction.* This inexcusable charge is apparently based on the fact that the court's opinion does not restate the facts. But why should it? That task had been fully performed in *Dollar v. Land*, 184 F.2d 245. The court below was warranted in saying, as it did (R. 284),

"There has been a thorough review of the facts in numerous prior opinions (see *Dollar v. Land*, 154 F.2d 307; 330 U.S. 731 * * * 184 F.2d 245 * * * We see no reason to repeat them here."

G. The opinion of the District of Columbia Court of Appeals Concededly States All the Material Facts in the Record.

In our briefs in the District of Columbia Court of Appeals, the issue of pledge or sale was examined *in extenso*. Our opening and reply briefs contained nearly 200 pages on the subject. We would hesitate to burden the Court with a repetition of that discussion. And the opinion of that court makes it unnecessary to do so. Everything stated as a fact in that court's opinion, 184 F.2d 245, is concededly a fact; it has never been suggested that the opinion was guilty of a misstatement. Similarly, that opinion states all the material facts; it has never been suggested that it omitted mention of any fact whatever in the record thought by the Department of Justice to be material.

H. The Case Is Controlled by Admitted Facts.

The District of Columbia Court of Appeals, after reviewing the record in all its details, concluded that it had to hold the transfer to be a pledge because of *two overriding and compelling facts*. It said (184 F.2d 245, 253, 254):

"* * * We are led to this conclusion principally by the weight of two considerations: (1) The general equitable character of the transaction and (2) the action of the Commission, at the time, in issuing the new certificates to itself and not to the United States."

*The District Court had the case under submission from June 4, 1951 to October 3, 1951.

FIRST COMPELLING CONSIDERATION

The first compelling consideration rests on admitted facts which may be tersely summed up thus:

In the 1920's appellees Dollar of California and R. Stanley Dollar purchased certain ships from the old Shipping Board, the predecessor of the Maritime Commission, and as part of the purchase price gave promissory notes and ship mortgages to the United States (J.A. 294-310). In 1929 these ships were transferred to Dollar of Delaware (APL) with the necessary consent of the Shipping Board, under an agreement whereby all three became jointly and severally liable on the notes (J.A. 310-319). Other transactions resulted in other notes to the United States (J.A. 321). By August 1938 the amount still owed by Dollar of Delaware to the United States was roughly 7½ million dollars. Of this debt Dollar of California was jointly and severally liable for about one-half and R. Stanley Dollar for about one-fourth (J.A. 350, 351).

As stated by the Court of Appeals, "At this time the Adjustment Agreement, which is the nub of the present controversy, was made. The financial position of Dollar of Delaware was precarious." (184 F.2d at 250).

The agreement provided that a number of stockholders of Dollar of Delaware, including the joint obligors, Dollar of California and R. Stanley Dollar, but also including others who were in no way indebted to the United States, were to "transfer or cause to be transferred" all the stock involved in this case "to the Commission or its nominees."

The agreement also provided that no credit on the debt should be allowed by reason of the transfers (R. 26, and see 184 F.2d 250), and none ever was.

Adverting to these facts the Court of Appeals summed up their compelling effect thus:

"* * * The details of the transaction are exceedingly complicated, but they are summarized simply. Dollar was a debtor in a sum of some \$7,000,000. At a time when its

financial outlook was exceedingly bad its owners 'transferred' to its creditors 92 percent of its stock. Thereafter Dollar paid off its debt in full.

"Because of the power which a creditor has over his debtor, especially a distressed debtor, equity views with considerable skepticism claims by the creditor of rights beyond the right to security and repayment. Pomeroy states the matter thus:

* * * * *

"Equity tends strongly to treat as mortgages or pledges transactions between debtors and creditors relating to property of the debtors; even conveyances absolute on their face may be treated as mortgages if in fact they were security for and not satisfaction of the debts. Pomeroy, citing many cases, describes the 'general criterion * * * established by an overwhelming consensus of authorities,' 'the practical test,' 'the sure test and the essential requisite.' This criterion is the continued existence of the debt.

* * * * *

"In the case before us the debt remained in full force after these transactions and was paid in full. To hold that the creditor not only received payment in full but also became the owner of the debtor in full and absolute ownership would require a clear, almost inescapable, dictate to that effect. There is no such language or circumstance in this record. We give great weight to the application of this firmly established rule of equity."

A controlling principle of law was stated by the Court of Appeals thus (*Dollar v. Land*, 184 F.2d 245 at 256):

"In ordinary commercial transactions full consideration for release from a suretyship is paid by the surety in either of two ways, (1) satisfaction of part of the debt or (2) other collateral acceptable to the creditor is supplied. * * * Where the debt continues intact and the creditor releases a surety upon deposit of a paper security, the creditor does not by that transaction alone become absolute owner of the security thus deposited. He holds it as pledgee."

As part of the first compelling consideration other admitted facts stand out. The negotiations which culminated in the transfers began in 1937 and continued steadily. Admittedly, they started as demands by the Commission for additional security, particularly for voting control of the company. And in late April 1938 the Commission formally demanded that it be given that control by a *pledge* of the stock in question (cf. 184 F.2d at 252).

It is elementary that where negotiations between a debtor and creditor begin in demands for, or in discussions concerning, the giving of security (or better security than already possessed) and end in a transfer of property, the transaction is to be treated as having concluded just as the negotiations began, as a security transaction. Any claim that there was a change to an outright transfer, a sale of ownership, occurring somewhere along the line of negotiation, requires the clearest proof. The heavy weight of this burden is shown by *Morris v. Nixon*, 1 How. (U.S.) 118.*

The evidence overwhelmingly showed that no transmogrification of the character of the transaction under negotiation from one of pledge to one of sale occurred. It is not necessary now to burden the court with recital of the various items of evidence,† because one controlling fact stands out clear and admitted. As the Court of Appeals stated (184 F.2d at 254):

"It is agreed by both parties that in the early stages the discussions concerned security only. There is no doubt upon that point. The question is whether there was an *abrupt*

*See also 1 *Jones on Mortgages* (8th ed. 1928), Sec. 317, pp. 394, 395; *Smith v. Doyle*, 46 Ill. 451; *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943; *Chance v. Jennings*, 159 Mo. 544, 61 S.W. 177, 181; *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 909; *Murray v. Butte-Monitor Tunnel Mining Co.*, 41 Mont. 449, 110 Pac. 497.

In *Marshall v. Thompson*, 39 Minn. 137, 39 N.W. 309, on the basis of this principle, a purported transfer was held to be a mere substitution of security held for the same debt.

†For example, although the Government's contention was that change occurred abruptly in June, in July the Commission's executive director reported to it that "the present phase of the Dollar negotiations began in March 1938 when the Commission sent Messrs. Houlihan and Wilcox to San Francisco * * *" (J.A. 1673).

change of subject. The Commission relies heavily upon communications between it and its representative, *but so vital a change in the course of such negotiations* would have to be brought home to the corporation also. The expressions by which that is sought to be done are ambiguous to say the least."

A sale or outright transfer of title to the stock was never mentioned, either before the alleged change of character or afterwards. Neither the words "absolute title" nor "sale" appears in any scrap of paper sent to the Dollars, and the Commission did not orally communicate to the transferors the view that it would obtain ownership of the stock under the proposed agreement.

Not once during the course of negotiations did the Commission's San Francisco representative through whom negotiations proceeded mention to the Dollars the terms "sale" or "purchase" or state in any way that the Commission wanted or expected to receive outright title to the stock. Testifying for the Department of Justice, he stated that all that was said in conversations was the language of the contract itself (J.A. 1800, 1801).

Nowhere in the contract (R. 17-35) is there any provision or statement that absolute title was being transferred or that the transfer was one of ownership or sale. Nowhere does the contract contain the customary words found in bills of sale that the parties were selling and purchasing or that one party was granting, bargaining or selling. The Government relied purely and simply on the provision that the transferors agreed to "transfer * * * said stock * * * free and clear of all liens and encumbrances." But, as the Court of Appeals noted, these words in no way mean a sale (184 F.2d at 254, 2d col.).*

*The use of the word "transfer" is not only consistent with a pledge but, as a matter of elementary law, in order to constitute a pledge a "transfer" of title is essential. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Nisbit v. Macon Bank & Trust Co.*, 12 Fed. 686 (S.D. Ga.); *First National Bank v. Bacon*, 113 App. Div. 612, 98 N.Y.S. 717, affirmed in *Zartman, Trustee in Bankruptcy v. First National Bank*, 216 U.S. 134;

The situation, as the Court of Appeals noted, is this: By reason of the existence of a debt, a creditor came into possession of certain property—92% of the debtor itself. Subsequently, the debt was paid in full; yet the creditor asserts the right to retain the property, thus claiming the right not only to be paid but to own the debtor as well.

The assertion is unique. The books are full of cases where a creditor, having obtained property by virtue of a debt, has insisted on retaining it as owner *in lieu* of accepting payment but has been compelled by law to accept payment and to restore the property. But the most diligent search—either in the law books or the annals of Wall Street—will fail to reveal a single case like the present, where the creditor not only claims his bond but his pound of flesh as well:—insists upon being repaid his debt and, being repaid, yet claims the property.

Were appellant to recover, the harsh injustices would be worked that the creditor has been paid its debt in full and yet remains the owner of 92% of the capital stock of the debtor which it received only because of the debt, all to the utter deprivation of the former owners.

SECOND COMPELLING CONSIDERATION

The second compelling fact was summed up thus (184 F.2d at 254):

"We also think it of prime significance that the Plan provided for a transfer to the Commission, not to the United States; that the Commission caused the new certificates to be issued to the 'United States Maritime Commission,' not to the United States; and that the Commission continued to hold the certificates in its own possession without transfer to any recognized repository of property of the United States. If the transfer had been outright and absolute the stock belonged to the United States. * * * On the other hand the Commission was authorized by statute to manage and control the security for debts due the United States in shipping matters. The Commission, acting, at the time and since,

Hall v. Cayot, 141 Cal. 13, 17, 74 Pac. 299; *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82, 89; *Fletcher's Cyc. Corp.* (perm. ed.) Sec. 5640, p. 843; *Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737.

in accord with its own unimpeded judgment, treated the stock as in its own name, control and possession, a treatment consistent with the idea of pledge but wholly inconsistent with the idea that the United States was the outright and absolute owner. The Commission was an authorized custodian of collateral security, but it was not an authorized titleholder for property permanently owned outright by the United States."

If ownership were to pass, the stock would have had to be transferred to the "United States", for the Commission was not an entity and could own nothing. But on a transfer as security it was permissible that the stock be taken in the name of the Commission under Section 207 of the Merchant Marine Act of 1936 (46 U.S.C., Sec. 1117) which expressly empowered the Commission to enter into such contracts as might be necessary "to protect, preserve or improve the collateral *held* by the Commission to secure indebtedness."

Note also the provision that transfer might be made to a "nominee" of the Commission. In holding the stock as collateral and in exercising voting control thereunder as a means of "protecting, preserving or improving the collateral", the Commission could so administer its duties. On a transfer of ownership to the United States this was not permissible (cf. 33 Opinions of the Attorney General 570).

Two statutes, one *general* and one *special*, may be noted.

Title 40 U.S.C. Sec. 301 provides:

"The General Counsel for the Department of the Treasury shall have charge of * * * property which have been or may be assigned, set off, or conveyed to the United States in payment of debts".

Sections 202 and 206 of the Merchant Marine Act of 1936 (46 U.S.C., Sec. 1112 and 1116) require all "proceeds" of all debts, notes and mortgages received by the Commission as successor to the Shipping Board to be placed in the Treasury.

The provisions for transfer to the Commission or its nominee, rather than to the United States, lay at the heart of the provision

for transfer, and were a sure sign and a positive representation to the transferors that the transaction was what it had started out to be, a pledge.

We have quoted passages from the opinion in *Land v. Dollar* at some length because the two facts that *compelled* the court to its conclusion *can never be whisked out of existence*. They are *conceded, undisputed and conclusive*.

THE CONTROLLING EVIDENCE IS STIPULATED OR DOCUMENTARY

The bulk of the evidence in *Dollar v. Land* and here is stipulated and documentary. And as the Court of Appeals there said (184 F.2d 245 at 249), the *material and controlling facts* consist "*entirely [of] documentary evidence or undisputed basic facts.*"

THE INTERPRETATION OF THE 1938 CONTRACT WAS A PROPER MATTER FOR SUMMARY JUDGMENT ON THE RECORD

Speaking of this very case, 65 Harvard Law Review 467 states:

"A trial on the merits resulted in a judgment for the Commission. On appeal, however, it was held *as a matter of law* that the transfer had been a pledge, and the case was remanded with instructions to give the stock to Dollar. The Supreme Court denied certiorari."

We have just seen (p. 78, *supra*) that a case is one for summary judgment where the conflict is as to the conclusion to be drawn from undisputed facts.

Furthermore, the issue is the construction of a contract, namely, whether the contract of 1938 called for a pledge or outright transfer of ownership. When the construction of a contract is to be reached from documentary or undisputed facts, as here, the issue is one of law, not of fact. *Bell & Grant v. Bruen*, 1 How. (U.S.) 169, 183; *Copp v. Van Hise*, 119 F.2d 691, 695 (9 Cir.); Cf. *Kuhn v. Princess Lida of Thurn & Taxis*, 119 F.2d 704, 705, 706 (3 Cir.); *University City, Mo. v. Home Fire & Marine Ins. Co.*, 114 F.2d 288 (8 Cir.); *P. J. Carlin Const. Co. v. Guerini Stone Co.*, 241 Fed. 545, 552 (1 Cir.).*

*To be even more exact, the construction of a contract is always one of law. When construction depends on extrinsic evidence, and where different

NO ISSUE OF CREDIBILITY OF WITNESSES IS INVOLVED

Appellant comments that credibility of witnesses is involved (Br. 44, 48). But on no relevant matter upon which any witness testified was there ever a dispute or an issue of credibility. The resolution of no question of credibility has ever been necessary or discussed in any opinion by any court. The statement that credibility is involved is pure assertion.*

The part played by "credibility" is the same in testing an appellate court's power to reverse a finding as in testing the pro-

inferences of *fact* may be drawn from that evidence, the fact found by the trier may be binding. And the fact, so found, may be of such a character, in a particular case, as to permit but one permissible construction. But the construction is still always a question of law; in a jury case it remains a question for the court. *Estate of Thompson*, 165 Cal. 290, 296, 131 Pac. 1045; *California Well Drilling Co. v. California Midway Oil Co.*, 178 Cal. 337, 343, 177 Pac. 849; *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 18, 207 Pac. 527; Cf. *Bartolotta v. Calvo*, 152 A. 306, 112 Conn. 385.

And, of course, where the *material* evidence is uncontradicted, the construction is one of law without doubt. See cases, *supra*, and also *Southern Pacific Co. v. Hyman-Michaels*, 63 C.A.2d 757 at 766, 147 Pac.2d 692; *Moffatt v. Tight*, 44 C.A.2d 643, 112 Pac.2d 910; *Atwood v. City of Boston*, 37 N.E.2d 131, 310 Mass. 70. The *Atwood* case is illuminating because it was a careful statement by one of the nation's outstanding courts, and because it cites Williston on Contracts as supporting the principles it expresses. The court there said:

"But from whatever source light may be thrown upon the contract, * * * its meaning, what promises it makes, what duties or obligation it imposes, is a question of law for the court.' *Smith v. Faulkner*, 12 Gray. 251, 255. * * * Where there is conflicting evidence respecting the circumstances of the parties and the condition of the subject with which they are dealing, then a proper case arises for the jury. [Citation omitted] But where as appears in the present case the extrinsic evidence is not disputed or conflicting as to the material facts required to be found, the interpretation of the contract in its light still remains a question for the judge. *Smith v. Faulkner*, 12 Gray. 251, 255. Williston, *Contracts*, Rev. Ed. § 616. 65 A.L.R. 648, 652."

*Appellant relegates to a footnote (p. 44) its discussion of the subject, and there points to but two alleged instances, one involving the testimony of Mr. Dollar and one of Mr. Laughlin. But the facts are otherwise.

In our reply brief in the Court of Appeals for the District of Columbia we said (p. 34), "On this appeal we take the testimony of Mr. Laughlin (defendants' witness) wherever he positively testified to anything as a

priety of a summary judgment. The element of credibility is put in its place by the following terse quotations.

In *Dollar v. Land*, 184 F.2d 245, 249, the court quoted from *Orvis v. Higgins*, 180 F.2d 537, 539 (cer. den. 340 U.S. 810) thus:

" 'Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own * * * if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance.' "

Perry v. Perry, 190 F.2d 601, 602, quotes this passage and cites *Dollar v. Land*, supra, as an example. In *Wabash Corp. v. Ross Electric Corp.*, 187 F.2d 577, at 599 (2 Cir.), the court sums up the authorities as making it proper for an appellate court to reverse a finding

"when the issue can be resolved solely by a consideration of undisputed documentary evidence and physical exhibits (or of such documentary evidence and exhibits which render the oral testimony insignificant * * *)."

The court added:

"The same may be the result when the oral testimony is virtually undisputed and abundantly corroborated by undisputed documentary evidence."

fact." And in our Opening Brief (p. 114) we submitted the case with the statement that the testimony of the witnesses called by the Department of Justice "was largely irrelevant and was excluded, and what was admitted may be accepted."

As for Mr. Dollar, no *fact* testified to by him has ever been questioned, nor does his testimony enter into the decision of the Court of Appeals for the District of Columbia. Mr. Dollar testified that no mention was made of "sale" or "outright transfer" in the oral discussions with Laughlin (J.A. 1169); Mr. Laughlin admitted that to be so, testified that nothing more was said than appears in the written agreement, and said that the word "pledge" was not used either (J.A. 1800, 1801), but Mr. Dollar did not say that it was. There was no conflict between them.

DIFFERENT INFERENCES ARE NOT POSSIBLE

Appellant next argues that the record permits different inferences of fact. *The Court of Appeals held that it does not.* Appellant asserts that the court in its opinion in 184 F.2d 245, enumerated certain categories of fact indicating that there was a sale of the stock and certain categories indicating a pledge, and then weighed them (Br. 38, 39). What the court did was to catalog and review every *argument* advanced by appellant here, *but it found none persuasive.* It then cataloged and reviewed every argument made on behalf of the Dollars. While it felt that some were inconclusive, *it found the force of others inescapable.* Its conclusion, drawn from the record as a whole, was that there was no choice of reasonable inferences, and that *any view other than that of a pledge was "wholly untenable."*

After painstaking "review of the whole record" a court is empowered to conclude that one set of inferences is "so overborne by evidence calling for contrary inferences that the finding * * * could not on the consideration of the whole record, be deemed to be supported by 'substantial evidence.' " *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502. And so it was here. The question is not what conclusion should be drawn were there only one item of evidence, but the conclusion called for by the whole body of evidence.

With extreme selectivity appellant delves into the record and seeks to spin inferences to support its position. But all these matters were briefed, argued, subjected to careful and exhaustive analysis by a Court of Appeals. Appellant (Br. 39) asserts that "Obviously no court could rationally conclude that a record" containing certain listed items "did not raise a substantial issue of fact as to whether the stock was transferred outright." *But that is precisely what a Court of Appeals did hold*, for otherwise it could not have reversed the finding of an outright transfer. Thus appellant charges the District of Columbia Court of Appeals with being irrational, and with violating R.C.P. Rule 52(a). Indeed appellant openly asserts that that court disregarded the rule. Of course, it did no such thing.

These self-same assertions were made by the Department of Justice as the basis for its unsuccessful petition for certiorari. In *Land v. Dollar*, 341 U.S. 737, 748, Mr. Justice Jackson says:

"This Court *examined* the decision of the Court of Appeals that the Dollar interests were entitled to the stock in question and decided that *it did not merit further review*."

I. The Alleged New Evidence Asserted in Appellant's Brief (but Not Appearing in the Record) Is Utterly Empty.

We have seen that appellant made *no showing* in the District Court in opposition to the motion for summary judgment. We have also seen that an appellant may not advance alleged new evidence by mere assertion on appeal. Even if we ignore this fact and this rule, and gravely consider the items of alleged new evidence stated in appellant's brief (pp. 49-52), it will be seen that the claim of relevant new evidence is utterly empty. In the first place, the alleged evidence is not new. In the second place, it could not change the result (see pages 80 to 87, *supra*).

In *McComb, Administrator of Wage and Hour Division, U. S. Department of Labor v. Southern Weighing & Inspection Bureau*, 170 F.2d 526, 530 (4 Cir.), the court said:

"* * * The matters which the administrator suggests that he might be able to develop on further hearing * * * could in no way affect the conclusion to be drawn from the admitted facts. Everything that the administrator says that he hopes to show on further hearing may be admitted, and the result remains the same. Under such circumstances there is no reason why summary judgment should not be entered and the litigation ended."

In *Leishman v. Radio Condenser Co.*, 167 F.2d 890, 892, discussed at p. 66, *supra*, where this Court affirmed a summary judgment because the same issue had been decided in another case on a similar record, it rejected the claim that additional evidence was available, saying, "This evidence, if it had been presented, would not have changed our decision in the Associated case."

With these considerations in mind, we examine the alleged "new" evidence.

1. MATTERS ALREADY IN THE RECORD OR OFFERED IN *DOLLAR V. LAND*.

(a) In item (f) appellant asserts that no entry was made on the books of American President Lines that the stock was in pledge, and it bases a legal argument on that fact and certain sections of the Delaware corporation law. But the fact of how the transfers appeared on the company's books was stipulated in *Dollar v. Land*, as were copies of the stock ledger and journal sheets themselves (J.A. 1458-1462). In offering them in evidence, government counsel referred to these very sections of the Delaware law (J.A. 1456) and said, "I * * * ask your Honor to note that the stock issued in the name of the Maritime Commission without any statement 'as a pledgee' contained thereon" (J.A. 1459, 1460).

Appellant also asserts as new evidence that the Maritime Commission voted the stock. That fact was stipulated and placed in evidence in *Dollar v. Land* (J.A. 372-375).*

(b) In item (b) (p. 49) appellant refers to alleged statements made by appellee Lorber's bookkeeper to the Bureau of Internal Revenue. But at the trial in *Dollar v. Land* government counsel put on the witness stand someone from the Bureau with the Bureau's file on Lorber and sought to offer statements of the bookkeeper (J.A. 1765-1774). The testimony was stricken and was also characterized as merely cumulative (J.A. 1773).

(c) In item (i) appellant asserts that R. Stanley Dollar knew before 1945 that the debt was paid. As newly discovered evidence for that assertion (itself irrelevant) it refers to APL's 1943 annual report. But it is a stipulated fact that appellees did

*Too, the fact is irrelevant to the government's claim of ownership. The Maritime Commission had demanded a pledge of the stock with the right to vote in order to give it the managing control of the company as security (J.A. 110, 172, 1220). The pledge conferred on the pledgee the right to vote. See *Dollar v. Land*, 184 F.2d at 253. The controversy is whether the transfer was a sale or a transfer of "voting control of the company to protect the security of the Commission for the debts due" (184 F.2d at 252, 2d col., and see *Dollar v. Land*, 154 F.2d 307, 310).

not know until 1945 that the debt was paid (J.A. 390, 391). Moreover, the 1943 report was one of the documents authenticated by the stipulation (see Exhibit 1 to the Request for Admissions, at p. 22), and it was produced at the trial in *Dollar v. Land* to show that payment was not only not revealed but was concealed (J.A. 1312, 1414).

2. MATTERS PATENTLY IRRELEVANT.

(a) In appellant's item (e) (Br. 50) it is said that appellee The Robert Dollar Co. in a tax return for 1938 claimed a loss with respect to its stock because it was necessary to dispose of its investment.

But the stipulated fact is that The Robert Dollar Co. *never transferred any shares at all to the Maritime Commission*. It refused to have anything to do with the Commission (J.A. 252). Instead, it sold its shares to appellee Dollar Steamship Line in July 1938 for \$1,415,972.00. The transfer from The Robert Dollar Co. to Dollar Steamship Line was made on APL's corporate books on October 24, 1938, and subsequently Dollar Steamship Line transferred the stock to the Maritime Commission (J.A. 291, 2039, 2040). The shares now claimed by The Robert Dollar Co. are not the shares owned by it in 1938 but came to it by later devolution of title (J.A. 292).

(b) In item (h) appellant refers to testimony allegedly given by one Dunham in probate proceedings of the J. Harold Dollar Estate. Dunham is no party to this suit, nor was he a party in *Dollar v. Land*. What he says could bind no one. He testified in *Dollar v. Land* as an accountant relative to statements made by him in connection with the affairs of Dollar Steamship Line. The alleged new evidence, pertaining to the J. Harold Dollar Estate, is not even impeachment.

(c) In item (j) appellant refers to newspaper clippings of 1943 to the effect that the Maritime Commission was offering to sell the stock, and it asserts that the Dollars made no protest. But the pledge of the stock carried a power to sell. Until the debt was paid in October 1943 (J.A. 389), there could be nothing to

protest. Cf. *Dollar v. Land*, 154 F.2d 307 at 309, 2d col. And appellees did not know until 1945 of the payment.

(d) In item (l) reference is made to reports of the Maritime Commission to Congress. Self-serving statements by the Commission that it owned the stock could not possibly be admissible.

(e) In items (c) and (d) reference is made to one Mortimer Fleishhacker. It is said in item (c) that the Maritime Commission wrote a letter to the Bureau of Internal Revenue claiming absolute title to Mortimer Fleishhacker's stock. But, as just noted, what the Commission wrote is self-serving and irrelevant. In item (d) reference is made to alleged statements of an alleged "representative," unnamed, of Mr. Fleishhacker. In *Dollar v. Land* the Department of Justice offered statements of a "representative" of Mr. Lorber, and they were excluded as not binding (see paragraph 1(b) above). Furthermore, Mr. Fleishhacker is not a party to the litigation. In October 1945, he transferred to R. Stanley Dollar his interest in 13,061 shares of the A stock, about 1/20th of the shares involved in the case.* As the Court of Appeals for the District of Columbia said of like statements, no knowledge is attributed to appellees (184 F.2d at 255).

(f) In item (k) appellant refers to newspaper stories appearing in 1938. A number of newspaper clippings of the same time were covered in the Stipulation of Facts in *Dollar v. Land*, were offered in evidence, and were rejected as immaterial (J.A. 1840-1844). A multiplication of newspaper clippings does not constitute new evidence. Appellant states that it would like to examine appellees about these newspaper clippings. But government counsel did exactly that in *Dollar v. Land* (J.A. 1186-1192). The argument based on these new items is nothing new. Counsel made it in *Dollar v. Land*.†

(g) In its item (a) appellant refers to a "second account of the executors of the J. Harold Dollar Estate" (Br. 49). In pre-

*The case involves 2,100,000 shares of the B stock and 100,145 shares of the A stock (R. 5).

†In any event, a man's ownership in property cannot be destroyed by newspaper items or failure to read them, or if he reads them, to analyze them, or if he analyzes them, to protest them.

paring for trial in *Dollar v. Land*, government counsel examined the whole probate file, obtained certified copies, offered some of the documents in evidence, and some were received (D. Ex. 20, 21, J.A. 1462-1481). Others were even then excluded by the trial court as purely cumulative (J.A. 1482-1485). The document now referred to is just another of these papers. The alleged admissions of the executors of the J. Harold Dollar Estate were fully discussed before the Court of Appeals for the District of Columbia, and that court devotes a paragraph of its opinion to the subject, pointing out its insignificance, *Dollar v. Land*, 184 F.2d 245, 255, para. 9.

(h) In item (g) appellant refers to alleged testimony of one Ferguson, an executor of the J. Harold Dollar Estate, in its probate proceedings. This is repetitive of similar matters mentioned above, relied on by the government in *Dollar v. Land*. The answer now is the answer made then. Since an executor in California has no property interest in the estate, his statements, acts or omissions are not admissible against those who have, the heirs. *In re Bauer*, 79 Cal. 304, 21 Pac. 759. Appellant states, disingenuously, that Ferguson was attorney for the Dollars "at the closing of the stock transfer agreement." But as stipulated, Ferguson represented no one but the Estate of J. Harold Dollar in the negotiations and execution of the agreement of August 15th (J. A. 2045). He was *later* engaged for the limited purpose of superintending the exchange of papers in the transaction already agreed upon. An expression of opinion by him in the probate of the J. Harold Dollar Estate is not binding on the heirs as to the nature of the stock transfer. An attorney cannot waive anyone's rights by his construction of the legal effect of an instrument. *Hasman v. Canman*, 136 Cal. App. 91, 28 Pac.2d 372; *Adelstein v. Greenberg*, 77 Cal. App. 548, 552, 247 Pac. 520. Nor can he bind anyone by an expression of opinion concerning legal rights. *Restatement of Agency*, Sec. 288; *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

Obviously, his testimony in the J. Harold Dollar Estate is not binding on anyone else. What an attorney says while acting for one principal is not an admission against another. *Welch v. John-*

son, 93 Ore. 591, 184 Pac. 280; *Yonkers Builders Supply Co. v. Petro Luciano & Son, Inc.*, 269 N.Y. 171, 199 N.E. 45 at 47.

III.

THE UNITED STATES MARITIME COMMISSION NEVER HAD LEGAL AUTHORITY TO ACQUIRE OUTRIGHT OWNERSHIP OF THE STOCK FOR APPELLANT.

As we have already noted (pp. 2, 7, 17), regardless of any other point discussed in the previous pages, if the Maritime Commission had no statutory authority to purchase outright title of the shares, the judgment must be affirmed. And this is a pure question of law.*

A. The Decisions of the Court of Appeals for the District of Columbia in *Land v. Dollar* Establish That the Commission Lacked the Power.

This precise matter was thoroughly argued in the briefs and orally before the Court of Appeals for the District of Columbia. And the several decisions of that court are authority that the Commission lacked the power.†

In *Land v. Dollar*, 188 F.2d 629 (Jan. 31, 1951), cer. den. 340 U.S. 948, that court described its decision of July 1950 thus (p. 631, 1st col.):

"it was here held that (1) *the Commission had no power to acquire outright ownership of the stock*, and (2) *the plaintiffs were pledgors*."‡

*The question, of course, is not whether the United States had the power, but whether the Commission had it. The power rests in Congress until granted by it to some agency. An agency, by acting beyond its statutory grant, would "impinge upon the congressional prerogative." *Peoples Bank v. Eccles*, 161 F.2d 636.

†It may be noted, too, that one of the judges, Judge Clark, was a member of the Senate Committee on Interstate and Foreign Commerce at the time the Merchant Marine Act of 1936, which created the Maritime Commission, was considered and passed. He had a personal knowledge of the legislative history.

‡The appeals, on which the January 1951 decision was rendered, had to do with the form of the judgment and its enforcement. Technically, the court was thus not deciding other questions but was describing what

In *Sawyer v. Dollar*, 190 F.2d 623, the court further discussed the power of the Commission to take ownership of the stock (at pp. 643-645). Among other things it said (p. 644):

"So, in the present case, the debts due the United States by the steamship company made advisable the operation of the Lines by the Commission, just as debtor difficulties often require operation by a receiver on behalf of the creditor. *But the nationalization of an industry or a company is a totally different matter. It is to be undertaken only upon the most explicit authorization and direction of the Congress. There is no such authorization or direction in this instance.*"

The opinion of July 1950, *Dollar v. Land*, 184 F.2d 245, cer. den. 340 U.S. 884, considered in more detail the arguments advanced in support of the Commission's alleged power to take ownership. The government's major argument at that time was that the power was implied and derivable from the power of the Commission to grant subsidies and from an alleged power to rehabilitate and maintain services essential to the Merchant Marine. Indeed, *this was the sole contention originally made.*

Referring to this argument, the court said, 184 F.2d 245 at 256, 1st col. (and the Supreme Court denied certiorari):

"But, however extensive the statement of the argument is, the unglossed contention is that the grant of a subsidy could be (and was in this case) part of the consideration for the outright acquisition of all the common stock of a company. *A more direct contradiction of the terms and intent of the statutes, both those relating to this Commission and those relating to the Reconstruction Finance Corporation, could scarcely be formulated. The subsidy and loan powers there provided were for the rehabilitation of private industry. They were not blinds for Government acquisition of operating industrial concerns. Subsidy is not a synonym for socialization.* While it is perfectly true that the Commission could, and should, make all proper and desirable requirements for the protection of Government loans, *its power*

it had decided in July 1950. The quoted statement shows, however, the views of the court on the subject of statutory authority, reached after the most thorough and comprehensive study of the question.

stops at the line which separates the lender from the acquirer. It could validly come into ownership of stock in the course of foreclosing collateral in the collection of a debt, but it could not acquire outright ownership in the guise of lending money and creating a debt. If the Commission did in fact grant the subsidy and arrange the Reconstruction Finance Corporation loan as consideration for the acquisition of outright and absolute title to full ownership of this stock, we think it exceeded any power granted it by the Congress."*

The court further said (184 F.2d 245, 249, first col.):

"The first problem presented to us upon this appeal is whether the Commission had authority to acquire the shares of stock outright by purchase. If it had such authority it had authority to acquire by purchase the stock of any operating ship company and to operate that company. The Commission was created by statute and has only such authority as the statute, directly or by necessary implication, confers upon it. It does not contend that the statute specifically or in terms confers the power to acquire and operate a steamship company, and careful reading does not reveal any such provision."

And again it said (184 F.2d 245, 249, second col.):

"The power to own and operate transoceanic steamship lines is a power of tremendous scope. It would involve decisions of vast national importance and the collection and disbursement of vast amounts of public funds. It is inconceivable to us that Congress would have left to implication so vast a power. We do not think that if Congress had intended the Maritime Commission to enter upon such ownership and operations it would have left the matter entirely to a clause which merely authorized the Commission to execute contracts."

The court then noted an argument that the Commission had the power to acquire the stock as an incident to an alleged power to compromise claims. *That argument was an afterthought first*

*There was, of course, no foreclosure of collateral in the present case.

*conceived after the trial.** The Court of Appeals said it did not pass upon that argument, because it did not reach it (184 F.2d at 250, first col.), since no compromise was involved: "the acquisition of this stock was [not] part of the compromise or settlement of a claim", saying that it "must look at the essential nature of the transaction and not play upon phrases" (p. 256).

Later, in *Sawyer v. Dollar*, 190 F.2d 623, the court again addressed itself to the subject and said (p. 643):

"* * * two views are possible: (1) That Congress considered the acquisition of the shares by the Commission just as this court eventually held it to be; i.e., an acquisition by way of pledge for security of a loan. * * * (2) That Congress intended to make one single exception to its general legislation concerning the financial control of corporations of which the United States is part owner. It is inconceivable to us either that Congress intended to make one single exception to its policy and program on this subject or that, if it intended to make such an exception, it would not say so."

SUMMARY OF WHAT THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS HELD

The Court of Appeals for the District of Columbia has held, point-blank, that the Commission had no power to acquire outright title under any theory.

In its opinion of July 17, 1950 (184 F.2d 245) it categorically rejected, with one exception, every argument advanced by the Department of Justice relative to power. The one exception was the argument that the Commission had power to compromise debts. It did not rule on that argument at that time because, as it said, the transaction of 1938 simply could not be described as a compromise.

But in two later opinions in the cause, in January 1951 and May 1951, it rejected *any and all arguments* that the Commission had the power to acquire the stock outright. On January 31st it

*There is not the faintest mention of it in the government's briefs in the Court of Appeals or in the Supreme Court in the appeal culminating in the decisions in 154 F.2d 307 and 330 U.S. 731.

said that "the Commission had no power to acquire outright ownership."

B. The Commission Lacked the Necessary Power.

In view of the decisions of the Court of Appeals of the District of Columbia, we direct our discussion to the contention that the Commission had power to acquire ownership of the stock as part of a "compromise".*

1. STATEMENT OF PRELIMINARY PRINCIPLES.

(a) He Who Asserts the Power Must Point to Specific Statutory Authority. What Is Not Specifically Granted Is Prohibited.

No governmental agency may take any action except under express statutory authority or upon authority necessarily or naturally inferable from a duty imposed or authority granted. This is elementary.† Since 1861 (if not earlier) there has been an express prohibition against the acquisition of property by government agencies without authority of statute. Title 41 U.S.C., Sec. 11.

In the *Teapot Dome* cases the Supreme Court emphasized that "it has long been its [Congress's] policy to prohibit the making of contracts of purchase * * * in the absence of *express* authority and adequate appropriations therefor." *Pan American Co. v. United States*, 273 U.S. 456 at 501, 502. Cf. *United States v. Tichenor*, 12 Fed. 415 (D. Ore.). And as said in *Texas & Pacific Ry. Co. v. Pottorff*, 291 U.S. 245, 253 (per Brandeis, J.), speaking of national banks:

"The measure of their powers is the statutory grant; and powers not conferred by Congress are denied."

*The District Court for the District of Columbia in 82 F. Supp. 919 sought to support the power by other reasoning. The Department of Justice did not seek to support that reasoning, we answered it in our briefs in the Court of Appeals, and that court in its opinion in 184 F.2d 245 agreed with us. The District Court's opinion therefore lacks authority, and because of limitation of space, we do not deal with it further.

†Thus the authority of the Postmaster General to establish post offices has been held to carry no implied authority to lease property in which the Postmaster may carry on his activities. *Chase v. United States*, 155 U.S. 489.

The Attorney General has repeatedly advised that no authority exists for a government agency to make a contract, unless it is expressly granted or an appropriation has been made to fulfill it, or unless authority is *necessarily* inferred from a duty imposed or an authority given; and that it is not sufficient that the agency regard the particular contract to be desirable.*

Within the meaning of the rule that a government agency has only such powers as are expressly granted or necessarily implied from those granted and that a "power must be given in language explicit and express, or necessarily to be implied from other powers," the word "necessary" means either "inevitably implied" or "so strong a probability of intention that an intention contrary to that * * * cannot be supposed." *Citizens Street Railway v. Detroit Railway*, 171 U.S. 48, 53, 54.

(b) Concededly There Was No Express Grant to the Commission of the Necessary Power. Unless It Can Be Tortured Out of Section 207 of the Merchant Marine Act of 1936, It Did Not Exist.

No statute confers authority on the Commission to acquire or hold shares of stock in a private corporation other than as collateral for an indebtedness.

When *Land v. Dollar* was before the Supreme Court, the Solicitor General conceded (Brief, p. 33) that "authority to acquire absolute title to the stock is not conferred on the Commission in specific language."†

The Department of Justice rests its claim of power on an implication from Section 207 of the Merchant Marine Act of

*4 *Opinions Attorney General* 600; 9 *Opinions Attorney General* 18; 15 *Opinions Attorney General* 235; 19 *Opinions Attorney General* 650; 31 *Opinions Attorney General* 597. The intention of Congress that the power be exercised should be so clearly expressed as to amount to an express authority; otherwise the exercise of the power by an executive department is illegal (11 *Opinions Attorney General* 201).

†The Comptroller General of the United States in his Annual Report to Congress for the fiscal year ending June 30, 1940 stated that the Commission's alleged acquisition of the stock was "under doubtful authority, to say the least." (J.A. 1327, 1329)

1936 (46 U.S.C. Sec. 1117). And the Department has conceded, "If Section 207 does not give the Commission that authority then the defendants' [appellant's here] case falls" (J.A. 2067).

Section 207, as amended in 1938, provides,

"The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this chapter, *or to protect, preserve, or improve the collateral* held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *"

The very face of this section demonstrates that it gave to the Commission power to make contracts and disburse funds only (1) to carry out the activities authorized by the Merchant Marine Act, and (2) to *protect, preserve or improve the collateral* held by the Commission to secure indebtedness. It conferred no power to retain property after the indebtedness for which it is collateral has been paid or to take title to property independently of foreclosure of collateral. Security remains security, it remains attached to the debt, and when the debt is paid its function has been served.

As the District of Columbia Court of Appeals said in May 1951, *Sawyer v. Dollar*, 190 F.2d 623, 644:

"It must constantly be remembered that the United States does not say it paid anything whatever for this stock; as a matter of fact it did not. The acquisition was described in a single sentence by the Comptroller General in his 1950 report to the Congress concerning the Maritime Commission. He said:

"The Commission acquired this stock under an agreement dated August 15, 1938, in consideration of releasing R. Stanley Dollar and the Dollar Steamship Lines (California) from all liability as makers, co-makers, guarantors, or endorsers on the mortgages on 12 ships purchased from the United States Shipping Board in 1923 and 1925."

That sentence is a clear and unmistakable description of a substitution of one sort of security (negotiable paper col-

lateral) for another (personal guaranties) upon a loan. That is what we held it to be."

The question is simply one of construing Section 207, the language of which is clear and simple; the problem is merely "to read English intelligently".*

2. THE COMMISSION HAD NO POWER TO COMPROMISE DEBTS DUE THE UNITED STATES OR TO ACCEPT IN PAYMENT ANYTHING BUT MONEY.

The Commission no more had power to use claims of the United States to buy a steamship line than in the *Teapot Dome* cases the Secretary of the Navy could exchange oil in naval reserves for storage facilities. *Pan American Co. v. United States*, 273 U.S. 456, 501, 502; *Mammoth Oil Co. v. United States*, 275 U.S. 13, 35. There the Secretary of the Navy relied on a statute empowering him to "use, store, exchange, or sell the oil", but no statute, even similar to that, exists here.

*In *Northern Securities Company v. United States*, 193 U.S. 197, 400, Mr. Justice Holmes said:

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. *What we have to do in this case is to find the meaning of some not very difficult words.* We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, *yet when their task is to interpret and apply the words of a statute, their function is academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.*"

(a) The Power to Compromise Claims of the United States Rests in the Secretary of the Treasury or, in Certain Circumstances, in the Attorney General.

If the Commission had the power to compromise, that power was not expressly granted and would have to be implied from some express power. The only source from which it has been sought to imply such a power is the mere fact that collection of a debt due from the old Dollar Line (now APL) and secured by the joint liability of certain of the Dollars was entrusted by law to the Commission.

But it is a settled rule of the law of agency that an agent authorized to collect or receive payment "has no implied power to release the debt, in whole or in part, or to compromise the claim, without payment in full; * * * to discharge part of the debtors * * * [or] discharge sureties" (*Mechem on Agency* (2d Ed. 1914), Sec. 955, pp. 687, 688) or to receive anything but money (*Mechem*, Sec. 946, p. 679); *Ward v. Smith*, 7 Wall. 447; *Lucke v. First Nat. Bank*, 193 Cal. 184, 187, 223 Pac. 547.

Moreover, no power can ever be implied in the teeth of an express statute. The usual rule of agency is made doubly applicable to government agencies by the fact that federal statute has long prescribed that, unless otherwise expressly provided, debts to the United States *must* be paid in money (Rev. Stat. Sec. 3473; Title 31 U.S.C., Sec. 198)* and they must be paid *in full*.

Of course, the United States, *as such*, as an incident to its general right of sovereignty, has the power to compromise its claims and to accept something other than money in satisfaction of them (cf. *United States v. Hudson*, Fed. Cas. No. 15413, and *United States v. Lane*, Fed. Cas. No. 15559). But the powers of the United States are one thing; the powers of any particular agency are another. *Congress has not conferred the general power to compromise claims on the Commission.*

Powers of the United States can only be exercised "through the instrumentality of the proper department to which those

*In U.S.C.A., Sec. 198 is misquoted but is corrected in the pocket supplement.

powers are confided," *United States v. Tingey*, 5 Pet. (U.S.) 114 at 128. In *United States v. Lane*, wherein Tingey's case is quoted, it was said of the power to compromise claims that "The Solicitor of the Treasury is charged with this duty" (2d headnote).

And as said in *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294,

"Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. * * * Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or to be implied from other powers so granted."

*And Congress has conferred this power of compromise on, and confined it to, the Secretary of the Treasury. Title 31 U.S.C., Sec. 194.**

Appellant asserted below that a government official responsible for collection of a claim of the United States is authorized to compromise the debt and accept property in satisfaction thereof without specific authority, and that the power has been exercised "since the foundation of the Government." This contention is not so and is not remotely supported by the cases relied on. *United States v. Tingey*, 5 Pet. 115; *United States v. Bradley*, 10 Pet. 343; *Neilson v. Lagow*, 12 How. 98 and *United States v. Hudson*, Fed. Cas. No. 15,413. These cases hold that the United States—not any particular official or agency—can do these acts, but *they take pains to state, as just noted, that the powers of the United States can only be exercised "through the instrumentality of the proper department to which those powers are entrusted."*

The power which officers of the United States—as distinguished

*"Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the General Counsel for the Department of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws."

from the United States—have exercised “since the foundation of the government” by implication from the power to collect claims is, as the cited cases clearly show, the power to take *security* to secure those debts for the purpose of having them paid in full according to the contract. See also *United States v. Linn*, 15 Pet. 290; *Dugan’s Executor v. United States*, 3 Wheat. 172. And since the foundation of the government the courts have also consistently held that no government agency may give up what belongs to the government to acquire property, in the absence of express authority. In *Neilson v. Lagow*, *supra*, the Court also made it clear that the authority implied from the power to collect a debt is *strictly limited to taking security for the debt*, and it said (p. 108):

“The object of any form of conveyance by way of security is not to acquire the dominion and ownership of land, nor even to invest funds therein, but simply to obtain payment of the debt secured. This is the principal thing to which all others are incidental.”

Section 194 of Title 31 U.S.C. not only confers the power to compromise on the Secretary of the Treasury, *but it also prescribes the extent of the powers relative to compromise which may be exercised by the official having charge of the claim in favor of the United States*: His function extends no further than to render to the Secretary “a report * * * showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered.”

Under a similar statute prescribing how and by whom claims arising under the internal revenue laws may be compromised (Title 26, U.S.C., Sec. 3761(a)), it is held that the method provided is “exclusive” and, unless followed, the compromise is not binding. *Botany Worsted Mills v. United States*, 278 U.S. 282. There the Supreme Court said (p. 289): “*When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.*”

To the same effect, *George S. Colton etc. Co. v. White*, 16 F. Supp. 726 (D. Mass.). Such claims can therefore not be com-

promised without the consent of the Secretary of the Treasury. Cf. *Royal Indemnity Co. v. United States*, 313 U.S. 289, 295.

The power to compromise claims due the United States may also be exercised by the Attorney General if the controversy has been referred to him for handling.* *But no other agency has any power to compromise a debt to the United States or to accept anything other than as provided by the contract itself or payment in full* (21 *Op. Atty. Gen.* 494), except in specific instances covered by specific and express statutes.†

The authority to make a contract for the United States implies no authority to cancel it or relinquish any rights thereby acquired or to release the obligor in any part. *American Sales Corp. v. United States*, 32 F.2d 141 (5 Cir.).

(b) A Review of the Merchant Marine Act and Its Amendments from Time to Time Clearly Negatives the Power to Compromise Debts Due the United States.

No statute singled out the Maritime Commission for special treatment by conferring on it a general power to settle and compromise claims of the United States entrusted to it. On the contrary, in every instance where Congress has intended to confer on the Commission the power to adjust, settle or compromise claims for or against the Government, it has done so by an express and limited grant.

*By virtue of Section 5 of Executive Order No. 6166 of June 10, 1933 and the Attorney General's capacity as the law officer of the government in litigation. 38 *Opinions Attorney General* 98.

†Appellant asserted below that other agencies have had a power to compromise debts, by implication. But the only alleged examples advanced were the authority of the Interstate Commerce Commission to extend the time for payment of loans to railroads under Section 210 of the Transportation Act of 1920, the power of the government of Puerto Rico to compromise liability for an offense under the Harrison Narcotic Act, and the power of the Attorney General to compromise claims in litigation. The first two examples are not cases of an implied power but of an express grant of the power. And the power of the Attorney General rests on a different basis, has long been recognized, and furnishes no analogy.

In the Merchant Marine Act of 1936 as originally enacted, Congress expressly granted the Commission power to adjust and settle claims *in one and only one instance*. Section 401 (Title 46 U.S.C., Sec. 1141) of the Act having cancelled all ocean mail contracts as of June 30, 1937, Section 402(a) (46 U.S.C., Sec. 1142) authorized the holder of any mail contract so terminated to file an application with the Commission "to adjust and settle all rights of the parties under such contract." Section 402(b) authorized the Commission "to attempt to adjust all differences with such contractor, including any claims of the contractor against the United States and *any claims of the United States against such contractor*, arising out of its foreign ocean mail contract."

Section 402(d) (46 U.S.C. Sec. 1142(d)) was added in 1938 to authorize the Commission in case suit based upon the termination or breach of the contract had been filed by the contractor in the Court of Claims prior to July 1, 1937, to settle "any claims of the contractor against the United States and any claims of the *United States against such contractor*," arising out of said contract.

Yet *even these powers to compromise specific claims were limited and hedged*. If a settlement agreement were reached under Section 402(d), it was reviewable by the Attorney General, who had the power to carry the matter into the Court of Claims (under Section 402(b)) or to veto it in 60 days (under Sec. 402(d)). And if a settlement under Section 402(d) provided for payment of money, it had to be applied against any debt owing to the United States by the contractor. Even then, the release of the contractor was not to be given by the Commission, but "The Comptroller General of the United States shall execute a discharge of the amount of such debt satisfied."

When the Merchant Marine Act was extensively amended in 1938, there was an express grant to the Commission of the power to settle, adjust and compromise *one other specific kind of claim*. In the new Federal Ship Mortgage Insurance Title whereby the Commission was authorized to insure private mortgages, it was provided in Section 1105(d) (Title 46 U.S.C., Sec. 1275(d))

that "the Commission shall also have power to pursue to final collection, by way of *compromise* or otherwise, all claims against mortgagors assigned by mortgagees to the Commission as provided in this section."

In 1940 Congress once more amended the Merchant Marine Act, and, *inter alia*, added a subtitle, "Insurance," to Title II of the Act, which authorized the Commission to provide insurance and reinsurance under stated conditions against loss due to war and marine risks. Section 226(a) (46 U.S.C., Sec. 1128(e)) of the Act, as amended, provided that "The Commission in the administration of *this subtitle* is authorized to adjust and pay losses, *compromise* and settle claims whether *in favor of* or against the *government*, and to pay the amount of any judgment rendered in respect of any suit or settlement agreed upon in respect of any claim."

Clearly, both in 1938 and in 1940, Congress believed that the Commission had no general power to adjust, settle and compromise claims administered by it and found it necessary *expressly* to grant that power in respect of claims arising out of new rights and duties then created.

Moreover, Section 9 of the Suits in Admiralty Act (46 U.S.C., Sec. 749) provides that the Maritime Commission (or the Secretary of any Department or the board of trustees of any government owned corporations having control of a merchant vessel) may "compromise, or settle any claim in which suit will lie" under *that* act.

Expressio unius est exclusio alterius. The express grants in 1936, 1938 and 1940 would have been unnecessary and frivolous if the Commission already possessed the power under some supposed broad grant.

(c) Whenever Power to Compromise Claims Is Conferred on Agencies Other Than the Secretary of the Treasury, It Is Closely Restricted.

A review of the statutes shows that whenever a power to compromise claims of the United States is bestowed by Congress on *any* agency other than the Secretary of the Treasury, it is not left

vagrant but is closely confined. Reference may be made to power of the Secretary of Agriculture to compromise indebtedness of farmers arising under a variety of farm loan acts (Title 12 *U.S.C.*, Sec. 1150), of the Department of Justice (formerly the general accounting office upon consent of the Postmaster General) to compromise claims of the post office (R.S. 295; Executive Order No. 6166, Sec. 5, June 10, 1933; *U.S.C.*, Title 31, Sec. 115), of the Bonneville Dam Administrator (Title 16 *U.S.C.*, Sec. 832a, 832k), and of the Secretary of the Navy (Title 34 *U.S.C.*, Sec. 600a-600c; 46 *U.S.C.*, Sec. 797, 799).

A holding that the Maritime Commission, *without express statutory grant*, has an *unlimited* power to compromise, while other agencies, with specific grants, do not, would be an extraordinary piece of statutory construction.

(d) The Commission Did Not Have the General Powers of a Private Corporation.

To reach this extraordinary construction the Department of Justice starts from a premise that Section 207 of the Merchant Marine Act conferred on the Commission all the powers of a private corporation. That premise is wholly untenable.

Section 207 does not confer on the Commission the substantive powers of private corporations. It merely specifies the *manner* in which the powers that are conferred on the Commission by the other sections of the law may be exercised. Just as a private corporation can only act "within the scope of the authority conferred by its charter," so the Commission could act only within the limits of the authority granted by the other sections of the Act. So long as it confined itself to those "activities" so authorized, it was given freedom in the *manner* of performing those "activities."

If an express power to do an act could *elsewhere be found*, that power could be exercised in the *manner* of a corporation. But the provision in Section 207 as to corporations does not itself create a power not otherwise expressly conferred.

(e) Even if the Commission Did Have the General Powers of a Private Corporation, Still It Had No Power to Acquire Absolute Title to the Stock Here.

Even private corporations are limited by their charters. Where the charter contains numerous express but limited grants, a broader power may not be implied. As said in *Central Transp. Co. v. Pullman's Car Co.*, 139 U.S. 24, 48:

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of its powers implies the exclusion of all others not fairly incidental."

Congress has created actual corporations for public purposes, but they are still government agencies (*Cherry Cotton Mills v. United States*, 327 U.S. 536, 539), restricted to the authority granted to them (*Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384), and the fact that they operate in corporate guise does not give them power to compromise claims. Thus it has been held that regional agricultural credit corporations could not compromise claims (*Regional Agricultural Credit Corporation of Minneapolis v. Stewart*, 289 N.W. 801, 69 N.D. 694), and under the present law the power to compromise claims of the Commodity Credit Corporation and the Federal Crop Insurance Corporation lies in the Secretary of Agriculture (*U.S.C.*, Title 12, Secs. 1150-1150(a)).

Had Congress actually created a private corporation to administer the Merchant Marine Act of 1936, that corporation would be limited by the powers conferred on it. And if it were entrusted with the collection or supervision of debts due the United States, it could not compromise them unless express authority were granted to it.

Appellant's argument below rested on the premise that private corporation has broad power to settle or compromise *its* claims. But a corporation's implied power to compromise debts is confined to claims *belonging to it*. If it is merely an agent to superintend and collect claims of another, particularly of the Government, the fact that it happens to be a corporation gives it no

right to give them up for something different than called for by the contract. That fact that an agent is corporate does not broaden its authority.

(f) The Debts to the United States Were Not Created by the Commission's Activities but Were Entrusted to It by Law Only for Supervision and Collection.

The debts to the United States which appellant claims were compromised arose before the Commission's creation, out of contracts entered into with the old Shipping Board (184 F.2d 245, 250), which called for the payment of the debt in money, evidenced by promissory notes.

These debts passed into the Commission's possession under the provisions of Section 202 of the Merchant Marine Act (46 U.S.C., Sec. 1112), which provided that "all money, notes, bonds, mortgages, and securities of every kind, contracts and contract rights, lands, vessels, docks, wharves, piers and property and interests of every kind, owned by the United States" and controlled by the Department of Commerce as the successor of the United States Shipping Board, were transferred to the Maritime Commission.

The Commission was therefore a "conservator" or "receiver" of these debts. Section 206 (46 U.S.C. Sec. 1116) of the Act provided that "the *proceeds* of all debts, accounts, choses in action, and the proceeds of all notes, mortgages, and other evidences of indebtedness, hereby transferred to the Commission * * * shall be deposited in the Treasury of the United States."

The government has always asserted that this section, in its reference to "proceeds", meant money. It follows that the Commission was expressly confined to accepting money in payment of debts coming to it from the Board.

And the conclusion follows also from the general rule that once a contract is made, no government agency may modify it without express authority, *American Sales Corporation v. United States*, 32 F.2d 141 (5 Cir.); *Bayboro Marine Ways Co. v. United States*, 72 F. Supp. 728, other than the Secretary of the Treasury

as part of a compromise. It took the "First War Powers Act" of 1941 to grant the power to modify existing contracts (55 Stat. 838, Title II, Section 201).

Regardless of what power the Commission might have had to accept something other than money in settlement of debts created by its own transactions, it had no such power with respect to debts coming to it as "liquidator" of the old Shipping Board.

This is confirmed by still other provisions in the very section (Sec. 202) under which the debts passed to the Commission. That section further provides:

"Notwithstanding any other provision of law, the Commission may, in accordance with good business methods and on such terms and conditions as it determines to effectuate the policy of this chapter, *operate or lease any lands, docks, wharves, piers, or real property* under its control, and all money received from such operation or lease shall be available for expenditure by the Commission as provided in this chapter" (46 U.S.C. Sec. 1112).

If the Commission had the limitless power which the government's arguments postulate, this provision neither was necessary nor added to the Commission's powers. But Congress had no such understanding of the law, and therefore it *specifically* granted to the Commission the express power to make *certain specific types of disposition of certain specific types of property* coming from the Shipping Board.

The absence of a power to compromise is also shown by the fact that in 1938 Section 202 (46 U.S.C., Sec. 1112) was amended to empower the Commission to "make such extensions and accept such renewals of the notes and other evidences of indebtedness hereby transferred, and of the mortgages and other contracts securing the same, as it may deem necessary to carry out the objects of this chapter." This empowered the Commission *to extend and renew notes* which came to the Commission from the Shipping Board. In the absence of this amendment the Commission would have had no such power.

Is it not fantastic to argue that while the Commission had no power to compromise by merely extending time of payment even for one day—absent this express grant of 1938—it did have the power to compromise by giving up the debt entirely for anything it saw fit to accept!

Congress specifically empowered the Commission to sell or charter vessels transferred to it from the Shipping Board (Act, Section 904; 46 *U.S.C.*, Sec. 1243). And Section 508 (46 *U.S.C.*, Sec. 1158) specifically provided that the Commission could scrap or sell vessels transferred to it under Section 202 above, under certain conditions and with certain qualifications.

Under the maximum *expressio unius est exclusio alterius*, no such power to make disposition of other types of property, such as notes or mortgages, existed, certainly no power to use such notes and mortgages to acquire corporate stock.

(g) The Whole Structure of the Merchant Marine Act of 1936 Demonstrates That the Commission Was an Administrative Agency of Limited and Specified Powers.

The Act as a whole demonstrates that the Commission was an administrative agency with limited and specified powers. Congress specified the Commission's powers in painstaking detail. Time and time again, in the original Act, in amendments to it enacted in the 15 years thereafter, and in other legislation not amendatory of the Act, Congress, believing it necessary to express itself specifically, conferred upon the Commission a variety of precise and delimited powers, all of which would have been unneeded if the Commission already had the broad and unlimited grant of authority which the government claims.

To say that outright ownership is acquired by compromise does not alter the nature of the transaction. It would still be in legal effect a sale and purchase, for any transfer of ownership for a consideration, whatever the consideration, is a sale and purchase. The *Uniform Sales Act* provides that "A contract to sell * * * is a contract whereby the seller agrees to transfer the property

* * * to the buyer for a consideration called the price" (Sec. 1; *Cal. Civ. Code*, Sec. 1721), and that "The price may be made payable *in any personal property*" (Sec. 9(2); *Cal. Civ. Code*, Sec. 1729(2)). And see definition of "value" (Sec. 76; *Cal. Civil Code*, Sec. 1796). Prior to 1938 that Act had been adopted in 36 states, including California and the District of Columbia.

If the Commission released claims of the United States against R. Stanley Dollar and Dollar Steamship Line as the purchase price of stock, it not only purported to acquire property but also to dispose of rights of the United States. But whenever Congress has desired to confer on the Commission power to *acquire* outright title to property, it has said so specifically, with detailed prescriptions of terms, manner of exercise and limitations. The same is true wherever Congress desired to confer power on the Commission to dispose of property or rights of the United States.

In the Appendix to this brief we set out a whole series of statutes demonstrating these facts.

If the power to compromise were identical with the power to exchange, note the consequences. The Department of Justice would squeeze a power to compromise out of the mere fact that a government agency is entrusted with debts to collect for the United States. Under the argument every agency having debts to administer could trade at will with these debts and buy any kind of property for the government.

(h) The Commission Derived No Power to Compromise from the Old Shipping Board, Because That Board Had No Such Power.

In the court below appellant sought to base the alleged power on the fact that the Commission succeeded to the powers and duties of the old Shipping Board. But the old Board had no power to compromise debts due the United States. Appellant's argument was based on a suave assumption that the Shipping Board had the powers of the United States Shipping Board Emer-

gency Fleet Corporation. But the Fleet Corporation was an entity quite distinct from the Board.

The old Fleet Corporation *was* a private corporation, organized under the laws of the District of Columbia under the authority of the Shipping Act of 1916 (39 Stat. 728, c. 451). Section 11 of that Act expressly authorized creation of a corporation for certain purposes and for a limited period of time. *United States ex rel Skinner & Eddy Corporation v. McCarl, Comptroller General*, 275 U.S. 1, states that the Fleet Corporation was "an entity distinct from the United States *and from any of its departments or boards*" (p. 11); it was for that reason that "audit and control of *its* financial transactions" was committed "under general rules of law" to its own corporate officers.

The Board did not have any such powers. No case either holds or remotely suggests that it did.

When the Shipping Board was terminated by statute, its powers were given to the Maritime Commission, *but the powers of the Emergency Fleet Corporation were not*. This is evident from a comparison of the successive Sections 202, 203 and 204 of the Merchant Marine Act of 1936 (Title 46 U.S.C., Sec. 1112, 1113, 1114).

Section 202 provided that all moneys and properties of the Shipping Board should be transferred to the Maritime Commission. Section 203, dissolving the Fleet Corporation, made similar provisions regarding its property. And while Section 204 prescribed that "all of the functions, powers and duties vested in the former United States Shipping Board" should be transferred to the Maritime Commission, there is no section or provision whatever that the powers and duties of the Fleet Corporation should be so transferred.

Thus the Act did three things: (1) It transferred to the Commission the *property* of the *Shipping Board*; (2) it transferred to the Commission the *powers* of the *Shipping Board*; (3) it transferred to the Commission the *property* of the *Fleet Corpora-*

tion. But it did *not* transfer to the Commission the *powers* of the Fleet Corporation.*

(i) The Commission Derived No Power to Compromise from Its Relative Freedom from Control of the General Accounting Office.

Another argument was that the Commission was given the same freedom from the control of the Comptroller General as had been possessed by the Fleet Corporation. *But the Comptroller General has never had any power to compromise debts due to the United States.* Consequently, freedom from his control relates to a wholly different subject.

The source of the Comptroller General's power is Title 31 U.S.C., Section 71, which reads:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

But this section pertains merely to accounting and auditing. By "settling and adjusting" claims and accounts it means merely the computation and determination of the fact and amount of the claim and not a compromise thereof. It is so held in *United States v. St. Louis Clay Products Co.*, 68 F. Supp. 902, which reviews the authorities.

As we have seen (p. 105, *supra*), Section 194 of the same Title 31 assigns the power to compromise to the Secretary of the Treas-

*The Department of Justice is fully aware of the distinction, for in their brief on the merits in the Court of Appeals for the District of Columbia, they said (pp. 101, 102):

"It is significant that Congress, by the Merchant Marine Act, 1936, transferred to the Commission 'All the functions, powers and duties vested in the former United States Shipping Board' by the several earlier shipping acts (46 U.S.C. 1114) and that the *Shipping Board was not organized as a corporation* and was not given by Congress power to sue and be sued. *By contrast, the powers of the Merchant Fleet Corporation, which was organized as a District of Columbia Corporation, and which had the power to sue and be sued were not so expressly transferred to the Commission.*"

ury. Section 71 was enacted in 1817. Until 1921 the words "Treasury Department" appeared where the words "General Accounting Office" now appear. Section 194 was enacted in 1863. Save for the addition of the last sentence excluding claims under the postal laws and the substitution of the words "General Counsel for the Department of the Treasury" for "Solicitor of the Treasury," it has never been changed. *Thus for 56 years both of these sections conferred their powers on the Treasury Department.* Section 71 conferred its powers on what was the "accounting branch" of the Treasury Department. But Section 194, since it conferred a power of greater responsibility, that of compromising claims, conferred it solely on the head of the Department, the Secretary himself.

These two sections did not duplicate each other. The first pertains to accounting or auditing, the ascertaining of claims or accounts, their amounts and propriety. The second pertains to the compromise of debts. If the power to compromise was covered by Section 71, then Section 194 would have been a superfluity.*

When the General Accounting Office was created the powers of Section 71 were transferred from the Treasury to the General Accounting Office.† The other powers of the Treasury, including the power to compromise debts, were not so transferred.

*The titles to the acts from which they were derived point to the same conclusion. The Act of 1817 (3 Stat. 366, c. 45, Sec. 2), the original of Section 71, is entitled "An act to provide for the prompt settlement of public accounts." The other (12 Stat. 740, c. 76, Sec. 10) was entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes." As they now appear in the U. S. Code, Section 71 is in Chapter 2 entitled "Audit and Settlement of Accounts," and Section 194 is in Chapter 6 entitled "Debts Due By, Or To, the United States."

†In *United States ex rel. Skinner & Eddy Corporation v. McCarl*, *Comptroller General*, 275 U.S. 1 at 4, in footnote 2, the court reviews the growth of the "accounting branch of the Treasury," whose powers were those transferred to the General Accounting Office. In *Globe Indemnity Co. v. United States*, 291 U.S. 476, it is pointed out that the function of the General Accounting Office in auditing and settling claims is the same as that formerly exercised by the Accounting Office of the Treasury Department.

Since the General Accounting Office would have had no power to enter into compromise, the alleged freedom of the Maritime Commission from control of the General Accounting Office is irrelevant.*

3. AS A MATTER OF LAW, THE TRANSACTION OF 1938 COULD NOT POSSIBLY BE CALLED A COMPROMISE.

Moreover, the argument about power to compromise is irrelevant because the transaction could not conceivably be called a compromise, as the District of Columbia Court of Appeals so held.

If it were a "compromise," what claims were here compromised? The contention is that the Commission compromised debts due the United States by taking stock in satisfaction instead of money. There was a debt of \$7,500,000 from the company (Dollar of Delaware, now called American President Lines). But *that* debt was not compromised. The contract provided (para. 14) that not one farthing of credit should be allowed on that debt as a result of the transfers (R. 26). And as noted in *Dollar v. Land*, 184 F.2d 245, "No part of the debt was released" (p. 250, first col.; and see 2d col.; also p. 252, 2d col. and 254, first col.).

*Appellant below invoked a portion of Section 207 of the Merchant Marine Act of 1936, viz.:

"All the Commission's financial transactions shall be *audited* in the General Accounting office according to approved commercial practice as provided in the Act of March 20, 1922, ch. 104, 42 Stat. 444: Provided, that it shall be recognized that, because of the business activities authorized by this chapter, the Accounting Officers shall allow credit for all *expenditures* shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary." (46 U.S.C. Sec. 1117).

Patently this proviso is merely a limitation on the requirement of *auditing* in the General Accounting Office, a requirement which has nothing to do with compromise of debts. Moreover, it relates, not to debts *due* to the United States, but to *expenditures of money* by the Commission.

Appellant below quoted from Reports of Congressional Committees on the 1938 amendment to Section 207. But the reports merely referred to the power of the Comptroller General to disallow *payments by the Commission* or to disallow items "in the accounts of the disbursing officer in connection with *disbursements for the Commission*."

It is next claimed that what was compromised were debts due from the transferors of the stock. But the transferors were R. Stanley Dollar, H. M. Lorber, Dollar Steamship Line (i.e., Dollar of California), Admiral Oriental Line, Mortimer Fleishhacker, and the Estate of J. Harold Dollar (R. 18-20). *And Lorber, Admiral Oriental Line, Mortimer Fleishhacker and the Estate of J. Harold Dollar were never indebted to the United States.* So stated, 184 F.2d 245, at 253, first col. As a pledge to protect the corporation in which they owned stock to give it time to get on its feet, the transaction makes sense. As a compromise it makes no sense because they had no debts to compromise.

As to R. Stanley Dollar and Dollar of California, they were merely sureties and joint debtors with Dollar of Delaware for a portion of the \$7,500,000 debt of Dollar of Delaware (184 F.2d 245, at 250 (first col.)). Mr. Dollar was jointly and severally liable with Dollar of Delaware for about $\frac{1}{4}$ of the debt, and Dollar of California was jointly and severally liable with Dollar of Delaware for about $\frac{1}{2}$ the debt (184 F.2d at 250, 2d col.). Their obligations were not different debts from that of Dollar of Delaware. There was but one single debt, for portions of which Mr. Dollar and Dollar of California were liable, but collaterally only, in a surety capacity. Yet, as we have seen, the agreement provided that no credit was allowed thereon.

Moreover, none of the conditions necessary to a compromise were present. Not even the Secretary of the Treasury could have validly discharged R. Stanley Dollar or Dollar Steamship Line of their liability in consideration for outright transfer of ownership of the stock, under guise of a compromise. The power conferred by Title 31 U.S.C., Sec. 194 is the power to "compromise." The word "compromise" relates to the settlement of claims of doubtful recovery. 36 Op. Atty. Gen. 40 (1929). Therefore, it is held that the power to compromise, i.e., to accept something other than called for by the contract, can be exercised only if (a) the claim is of doubtful validity, or (b) if there is doubt of its collectibility in case a judgment is rendered. In 38 Op. Atty. Gen.

94 (1934) this subject is clearly reviewed historically and analytically.

These requirements repeatedly stated by the Attorney General are inherent in the very concept of compromise. A compromise can only be made where there is a controversy or a dispute which is the subject of the compromise. *Cannavina v. Poston*, 124 Pac. 2d 787, 793 (Wash. 1942).

None of these essential conditions existed in the present case. There never was a dispute as to the existence of the collateral promises of Mr. Dollar and Dollar of California securing the debt, or their enforceability. The validity of the notes signed by these two and their liability thereunder were never questioned. The amount of these notes was in fixed sums and undisputed (J.A. 294-296, 350, 351). Nor was any element of doubtful collectibility present. Since the debt was secured by mortgages on ships (J.A. 296), the liability would actually only be for a deficiency judgment, if there should be one, after foreclosure of the ship mortgages and application of the proceeds on the debt. The mortgaged ships were worth vastly more than the debt (J.A. 1310, 1311, 1233-1235, 1236, 1242, 1264, 1265). This fact has always been conceded.*

The transaction of August 15, 1938 was upon its face simply an exchange of collateral promises for shares of stock substituted therefor. The parties have disputed whether the exchange resulted in an outright transfer of ownership or, as the Court of Appeals held, a substitution of security. But whether (apart from the question of the Commission's legal power to take ownership) it was sale or pledge, it *could not be* a compromise. So the Court of Appeals held. In *Cannavina v. Poston*, 124 Pac.2d 787, 793, the court held that an offer to discharge a liability by a transfer of property could not be treated as a compromise. And so the

*Although the government has argued that there would have been no common stock equity after payment of the secured debt plus all other debts plus all preferred stock, it has always been conceded that the ships were worth far more than the debt to the United States which they secured.

power to acquire ownership could not be evolved from an alleged power to compromise. And no other basis exists.

CONCLUSION

We respectfully submit that the judgment is right on each of the three main grounds discussed in this brief, and that it should be affirmed.

Dated: San Francisco, March 11, 1952.

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Appendix

WHENEVER CONGRESS WISHED TO CONFER ON THE COMMISSION POWER TO ACQUIRE TITLE TO PROPERTY OR TO DISPOSE OF PROPERTY OR THE RIGHTS OF THE UNITED STATES, IT SPECIFICALLY SO PROVIDED, WITH DETAILED LIMITATIONS AND PRESCRIPTIONS.

Congress always followed the procedure stated in the caption, not only in the Merchant Marine Act of 1936 but in subsequent amendments and in other legislation.

1. Re Power to Acquire Title.

For example, by Section 507 of the Act (46 U.S.C., Sec. 1157) Congress specifically conferred on the Commission the power to purchase from ship operators obsolete and inadequate vessels, at a fair and reasonable valuation which was to be credited on the sale price of new vessels to be constructed under a construction subsidy and sold to the ship operator.

In 1938 Congress added Section 215 to the Merchant Marine Act (Title 46 U.S.C., Sec. 1125) authorizing the Commission to acquire ships in certain circumstances. At the same time it amended Section 207 to add the words "or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness".

Also in 1938 Congress added the "federal ship mortgage insurance" title (46 U.S.C., Sec. 1271, et seq.), by which it authorized the Commission to provide ship mortgage insurance to private mortgagees. If private mortgagees acquired the mortgaged property by foreclosure or otherwise, Section 1105(a) (46 U.S.C., Sec. 1275(a)) authorized the Commission to buy it from the mortgagees, together with their claims against the mortgagor by foreclosure or otherwise, payment to be made in debentures.

Section 902 of the Act (46 U.S.C., Sec. 1242) authorized the Commission to requisition vessels "during any national emergency" declared by the President, and in 1939 this was amended to authorize the Commission to purchase vessels "whenever the

President shall proclaim that the security of the national defense makes it advisable" but the manner of the exercise of the power was carefully prescribed (53 Stat. 1255).

In 1941 the Commission was relieved of the necessity of advertising or having competitive bids in cases where it was otherwise authorized to acquire ships, "whenever deemed by the President * * * to be in the best interests of the national commerce and defense during the national emergency," and other authority was granted but delimited and bounded (55 Stat. 148).

In the same year, Congress authorized the Commission to purchase vessels free of requirements of previous advertising, whenever empowered to charter them during the national emergency where essential to the national defense (55 Stat. 242).

So late as 1946, in empowering the Commission to sell war-built vessels, Congress authorized the Commission to acquire certain kinds of ships in exchange for an allowance of a credit on the purchase from it of war-built vessels (60 Stat. 41, Sec. 8).

2. Re Power to Dispose of Property or Rights.

The original Act empowered the Commission to scrap or sell vessels not worth preservation (Sec. 508) (46 U.S.C., Sec. 1158), and to charter vessels (Sec. 704, 714; 46 U.S.C., Sec. 1194, 1204). The Federal Ship Mortgage Insurance title of 1938 empowered the Commission to sell properties acquired under that title (Sec. 1105(d), 46 U.S.C., Sec. 1275(d)). In 1939 the Commission was empowered to transfer to other agencies of the government upon terms approved by the President vessels requisitioned under Section 902 of the Act (46 U.S.C., Sec. 1242). In 1938 (52 Stat. 833, C. 557) it was empowered to sell or lease specific real property on stipulated terms and conditions. In 1940 (54 Stat. 216, C. 201) it was empowered to sell, upon competitive bids and after advertisement, vessels transferred to it by the Act in 1936 or thereafter acquired, until revocation of the proclamation of national emergency. In 1946 (60 Stat. 138, C. 243, Sec. 309(d)) it was empowered to sell small vessels for use in the Philippine fishing industry. In the same year (60 Stat. 41, C. 82,

Secs. 4 and 6) it was empowered to sell war-built vessels owned by the United States in specified circumstances and on stated conditions.

In addition to the large number of specific grants of power which we have already mentioned in this brief, and which would have been unnecessary had Congress intended to give the Commission general powers of a private corporation, an inspection of the statutes will disclose some 20 other specific powers in the original Merchant Marine Act of 1936, possibly 20 other powers conferred by amendments of 1938, 1939, 1940, 1942, 1943, 1944, and over 16 other powers in legislation enacted in 1940, 1941, and 1946, not cast in the form of amendments to the Act.*

*E.g., 54 Stat. 306, C. 327; 54 Stat. 1092, C. 838; 55 Stat. 5, C. 5; 55 Stat. 242, C. 174; 60 Stat. 41, C. 82; 60 Stat. 884, C. 785; 60 Stat. 961, C. 928; 61 Stat. 6, C. 6; 61 Stat. 10, C. 12; 61 Stat. 401, C. 290; 62 Stat. 172, C. 191.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE
ROBERT DOLLAR CO., AND H. M. LORBER, *Appellees*

On Appeal from the United States District Court for the Northern
District of California, Southern Division

APPELLANT'S REPLY BRIEF

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In the United States Court of Appeals
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No. 13130

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v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE
ROBERT DOLLAR CO., AND H. M. LORBER, *Appellees*

On Appeal from the United States District Court for the Northern
District of California, Southern Division

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

In support of their motion before Judge Murphy to dismiss the Government's quiet title complaint, the Dollars urged that the Government did not acquire outright title to the stock because, they said, the Maritime Commission had no statutory authority to acquire such outright title. Since Judge Murphy in his opinion and order dismissing the complaint (R. 282) made no mention of this contention by the Dollars, we did not discuss it in our opening brief.

The Dollars have, however, renewed this contention in this Court (Appellees' Brief, pp. 96-122), so we here demonstrate that it is without merit and briefly answer appellees' other contentions.

ARGUMENT

I.

The Dollars Are Precluded from Asserting That the Maritime Commission Lacked Statutory Authority to Acquire Out-right Title to the Stock.

The Dollars, in arguing that the Maritime Commission lacked authority to acquire title to the stock, are in effect saying that they are entitled to have the stock (valueless when they transferred it, but now worth millions of dollars) back, without paying a penny for it, *even though they fully intended to transfer absolute title to the Commission when they turned it over in 1938.*

The Adjustment Agreement of August 15, 1938, under which the Dollars transferred to the Maritime Commission their common stock in the operating line, has long since been carried out in full. The Dollars have received and enjoyed the full benefits afforded them by that agreement, particularly the release of R. Stanley Dollar and Dollar Steamship Line from their liabilities as sureties on the \$7,500,000 debt of the operating line (now American President Lines) to the Government. Also, thanks to the additional Government investment of \$4,500,000 in the line, a subsidy contract which has given the line over \$20,000,000 in Government grants, and the efficient management of the line installed by the Government, American President Lines has prospered. This has given substantial value to the Dollars' preferred stock in the line (which they did not transfer to the Maritime Commission under the Adjustment Agreement), whereas that preferred stock

was practically valueless when the Dollars turned over the common stock to the Commission in 1938.¹

The Dollars, having enjoyed these fruits of their bargain, now wish to retain them and at the same time get back from the Government the consideration which they gave (the common stock transferred to the Commission), on the ground that the Commission had not been delegated authority to acquire outright title. Elementary concepts of fairness and equity require that the Dollars be precluded from asserting any such contention.

There can be no question that the United States as such has the capacity and power to acquire ownership of corporate stock. If we assume for the moment that the Dollars are correct in their contention that the

¹ As to the carrying out of the Adjustment Agreement, see *Land v. Dollar*, 330 U. S. 731, 733-4; *Dollar v. Land*, 82 F. Supp. 919, 920-1 (D. Col.); *Dollar v. Land*, 184 F. 2d 245, 250 (C. A. D. C.). As to the line's receipts from the Government subsidy and its present prosperity, see the 1950 Annual Report of American President Lines (Exhibit C to the affidavit of Donald B. MacGuineas in support of the Government's motion for preliminary injunction, in the original record on this appeal) and *Dollar v. Land*, 82 F. Supp. 919, 922 (D. Col.).

As to the Dollars' continued ownership of preferred stock in the line and the lack of value of that stock in 1938 because of the line's grave financial position, see *Dollar v. Land*, 82 F. Supp. 919, 921-2, 926 (D. Col.), stating: "[the line's] position was desperate and bordering on the completely disastrous * * * the line was at the end of its resources and there is a serious question as to whether or not the stock had any value at the time." See also *Dollar v. Land*, 184 F. 2d 245, 250-1 (C. A. D. C.), stating: "the financial position of Dollar of Delaware was precarious * * * the stock, at the time of the Adjustment Plan, had little or no market value." Although these comments were directed specifically to the common stock, it is obvious the preferred stock could have no substantial value either, with the line in such desperate financial condition. And see *Land v. Dollar*, 330 U. S. 731, 733.

United States had not delegated to its agent, the Maritime Commission, the authority to acquire the stock on its behalf, that is a matter which concerns only the agent (the Commission) and the principal (the United States).

Limitations on the authority of a Government agency are for the benefit of the Government, not for the benefit of those, such as the Dollars here, who voluntarily contract with the agency. They have no standing to set up lack of authority to enable them to avoid their own contract. *American Refining and Smelting Company v. United States*, 259 U.S. 75, 78. "While it is established that a contract not complying with the statute cannot be enforced against the Government, it never has been decided that such a contract cannot be enforced against the other party." *United States v. New York and Porto Rico Steamship Company*, 239 U.S. 88, 92. A statutory limitation upon the contractual authority of a Government agency "creates a duty owing to the Government and no one else * * * it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 126, 127.

If the Adjustment Agreement, providing as it did for the outright transfer of the stock to the Commission, was "illegal"; i.e., not within the Commission's statutory authority, nevertheless, that agreement has been executed in full. The Dollars were as much a party to such "illegality" as was the Maritime Commission. They may not now rescind the contract on the ground that it was unauthorized. *Harriman v. Northern Securities Company*, 197 U.S. 244, 295-6; *Second Russian Insurance Company v. Miller*, 268 U.S. 552, 562; *Dent v. Ferguson*, 132 U.S. 50, 64-5; *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F. 2d 967, 971 (C.C.A. 7).

The Dollars assert in effect that the agreement to transfer the stock outright to the Commission was *ultra vires* as to it. If so, their acceptance of the benefits of the agreement precludes them from asserting *ultra vires* now. *St. Louis, etc., Railroad v. Terre Haute and Indianapolis Railroad Company*, 145 U.S. 393, 406-8; *Smith v. Sheeley*, 79 U.S. 348, 361; *Cush v. Allen*, 13 F. 2d 299, 301 (App. D.C.).²

The question as to whether the Dollars may now be heard to assert the Commission's lack of authority to acquire title to the stock has not been passed on in any of the decisions in the *Dollar v. Land* litigation. When that case was before the Supreme Court on the jurisdictional issue as to whether that suit was in effect an unconsented suit against the United States (*Land v. Dollar*, 330 U.S. 731), the Supreme Court had no occasion to, and did not pass on the validity of any defenses which might be raised, such as the one here argued that even if the Commission did lack statutory authority to acquire title to the stock, the Dollars are not in a position to raise that issue now. The Court said: "We intimate no opinion on the merits of the controversy. We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." (330 U.S. at 739.)

² Cases such as *Marsh v. Fulton County*, 77 U. S. 676; and *Citizens' National Bank v. Appleton*, 216 U. S. 196, holding that a corporation which refuses to perform its promise under an *ultra vires* contract may be required to refund the consideration which it has received under the contract, have no application here. The Maritime Commission completely performed all its obligations under the Adjustment Agreement, and the Dollars and all other parties to the agreement received in full the benefits accruing to them under it.

II.

The Maritime Commission Was Authorized to Acquire Absolute Title to the Stock.

The Maritime Commission acquired the stock under Section 207 of the Merchant Marine Act of 1936 (49 Stat. 1988, as amended by 52 Stat. 954, 46 U.S.C. 1117) and as statutory successor to the powers of the former United States Shipping Board (46 U.S.C. 1114).

Section 207 of the Merchant Marine Act of 1936 provides:

The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * * ³

Under this broad statutory authority the power of the Maritime Commission to acquire the stock is sustainable on each of four different bases: (1) as an exercise of its power to “protect, preserve, or improve

³ The balance of this section reads:

“* * * All the Commission’s financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922, ch. 104, 42 Stat. 444; *Provided*, That it shall be recognized that because of the business activities authorized by this chapter, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this chapter.”

the collateral held by the Commission to secure indebtedness"; (2) as an exercise of the power of the former Shipping Board to settle or compromise claims; (3) as an exercise of the Commission's general power to compromise claims, implicit in its authority to carry on its statutory functions by entering into contracts just as a "private corporation" may do; and (4) as an exercise of the implied power of Government agencies generally to enter into contracts reasonably incident to the performance of their functions.

1. Acquisition of the Stock Was Authorized as an Exercise of the Commission's Power to Protect, Preserve, or Improve Collateral Held by It.

At the time the Dollars transferred the stock to the Commission in 1938 the operating line was indebted to the Government in the amount of \$7,500,000 (exclusive of the new loans made by the Government under the agreement). R. Stanley Dollar was liable to the Government as a surety on this debt to the extent of \$1,750,000 and Dollar Steamship Line was similarly liable as surety to the extent of \$3,500,000. As security for this debt, the Government held mortgages on the vessels of the operating line.⁴

Proper management of the operating line and maintenance of its vessels was, of course, one of the most important factors in securing the payment of the debt to the Government and protection of the collateral—the mortgages on the vessels. When a commercial lender, such as a bank or an insurance company, which has money invested in an enterprise puts in a large amount of new money to save it from bankruptcy, it is, of course, not unusual for the lender to acquire the controlling stock of that enterprise as consideration

⁴ As to these facts, see *Dollar v. Land*, 184 F. 2d 245, 250 (C. A. D. C.).

for putting in new money and to insure trustworthy and efficient management. See *French v. Shoemaker*, 14 Wall. 314; *Handley v. Stutz*, 139 U.S. 417; *Commissioner of Internal Revenue v. Wright*, 47 F. 2d 871 (C.A. 7), remanding 19 B.T.A. 471; *Rosenberg v. Garfinkel*, 294 Mass. 196, 199-200, 200 N.E. 907, 909; *Colonial Trust Co. v. Hoffstot*, 219 Pa. 497, 69 A. 52.

Indeed, since the Dollars were unable or unwilling to put in new money in the reorganization of the operating line and their common stock then had no appreciable equity, fair and equitable treatment of the other financial interests involved required the elimination of the Dollars as common stockholders in the reorganized line. And by the same test it was proper for the Government to become the controlling stockholder in the line, since it was the only party putting in the new money necessary to keep the line out of bankruptcy. *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 112, 120-2, 126; *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 520-1; *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 452, 462, 475-6, 485-7; *Mason v. Paradise Irrigation District*, 326 U.S. 536, 541-3; *Reconstruction Finance Corporation v. Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495, 509, 516-7. The *Mason* and *Ecker* cases, *supra*, expressly hold that a Government lending agency (such as the Maritime Commission was in this case) is entitled to a preferential corporate position where it puts new Government money into the enterprise.⁵

So here the Commission, having discretionary authority to enter into contracts like a private corpora-

⁵ The cases just cited involved judicial corporation reorganizations. But financial arrangements which the Supreme Court imposes as "fair and equitable" in such situations cannot be any the less so when provided for in a voluntary reorganization, which is essentially what the Adjustment Agreement of 1938 was.

tion to protect and improve the collateral for the Government loans, was entitled to acquire the controlling stock interest and eliminate the Dollar management. As stated in *Dollar v. Land*, 82 F. Supp. 919, 926 (D. Col.):

* * * apparently it was felt that the only hope of solution and the only circumstances under which an operating subsidy could then be granted and further public money poured into a sinking enterprise in an effort to salvage it, was by its complete divorcement from both the personal and corporate plaintiffs [the Dollars].

That was a particularly appropriate course for the Commission to take since it considered that: "The past history of the Dollar operations made it obviously clear that the management was shockingly incompetent * * * the failure of management has been the principal factor reducing the company to its present regrettable condition * * * every conceivable device was adopted [by the Dollar management] to drain the earnings and working capital from the company as rapidly as possible" (R. 331, 333-4).⁶

⁶ If it be argued that the Commission could have obtained management control by a pledge of the stock with voting rights rather than by acquisition of outright title, there are two answers. (1) Since the statute authorized the Commission to enter into such contracts "as may, in its discretion, be necessary" to protect the collateral, the choice of methods rested with the Commission. (2) A pledge of the stock with voting rights would not have effectuated the Commission's policy that it "did not consider it appropriate in extending financial aid to maintain an essential foreign trade route, to create common stock equity values in favor of persons who were unwilling themselves to assume any financial obligations whatever" (Report of the Maritime Commission to Congress, dated April 10, 1939, entitled "Reorganization of American President Lines, Ltd", p. 61).

The trial court in *Dollar v. Land* specifically held that acquisition of outright title to the stock was authorized under the Commission's power to protect and preserve the collateral for the debt to the Government. *Dollar v. Land*, 82 F. Supp. 919, 922 (D. Col.). The reversal of the trial court by the District of Columbia Court of Appeals does not affect the former's conclusion on this issue, since the Court of Appeals reversed solely on its factual conclusion that the Dollars had pledged the stock and specifically stated that it was not passing on the legal issue of the Commission's authority to acquire outright title. *Dollar v. Land*, 184 F. 2d 245, 249-50 (C.A. D.C.). See pages 18-9, below.

2. Acquisition of the Stock Was Authorized as an Exercise of the Power Formerly Vested in the Shipping Board to Settle or Compromise Claims.

By 46 U.S.C. 1114 "All the functions, powers, and duties vested in the former United States Shipping Board * * * " were transferred to the Maritime Commission. Among the powers of the former Shipping Board so transferred were the settlement powers which the Shipping Board exercised through the medium of the United States Shipping Board Emergency Fleet Corporation, organized by it as a District of Columbia corporation to carry out certain of the Shipping Board's functions. See the Act of September 7, 1916, 39 Stat. 728, 731; *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 5; McDiarmid, *Government Corporations and Federal Funds*, p. 25.

The former Shipping Board and the Emergency Fleet Corporation (in contrast to the Government departments generally) were authorized to settle and adjust claims by and against them. As stated in the *Skinner & Eddy Corp.* case, *supra* (pp. 7-8, 11-12):

At no time, during the War, or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the general accounting officers of the Government or been passed upon, as accounts of the United States, either by the Comptroller of the Treasury or the Comptroller General. The accounts of the Fleet Corporation, like those of each of the other corporations named, and like those of the Director General of Railroads during Federal Control, have been audited, and *the control over their financial transactions has been exercised, in accordance with commercial practice, by the board or the officer charged with the responsibilities of administration. Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States.* * * *

* * * * *

* * * the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and *control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board.* * * *

There is nothing in the language of the statutes, or in reason, to support the suggestion that the Shipping Board has the power to adjust claims, but that the adjustment does not become operative unless there is approval of the final settlement by the Comptroller General. Nor is there any basis

for the further suggestion of Skinner & Eddy that the Shipping Board has power to make settlement, if it can; but where a settlement is not made and a suit by the United States is brought or threatened, the Comptroller General is the official to whom must be presented all claims for credit in such suit. * * *. [Italics supplied.]

This authority of the Maritime Commission, as successor to the powers of the Shipping Board, to settle claims is also clearly shown by contemporaneous legislative history. Thus the Senate Committee on Commerce, in reporting a 1938 amendment to Section 207 of the Merchant Marine Act of 1936, stated:

The committee has given consideration to the necessity for further changes in this section concerning the authority of the Comptroller General to disallow in the accounts of the Maritime Commission payments deemed to be authorized by the Maritime Commission under this act, to prescribe the system of accounts to be kept by the Maritime Commission, and to require that *all claims arising out of its activities be settled and adjusted in the General Accounting Office*. But from a review of the legislative history of this section, as well as a reading of its simple language, this committee is convinced that no further changes are necessary. *The authority conferred upon the Comptroller General by this section is obviously the same as that which he had over the affairs of the former Merchant Fleet Corporation*. It provides for the audit of the accounts of the Commission and a report to the Congress of any departure from the provisions of the act, but does not authorize the Comptroller General to make disallowances in the accounts of the disbursing officer in connection

with disbursements for the Commission. This conclusion is substantiated by the direction in said section to have the General Accounting Office audit the Maritime Commission's accounts according to approved commercial practice as provided in the act of March 20, 1922 (42 Stat. 444). *This gives to the Maritime Commission a freedom of action absolutely necessary because of the commercial nature of its functions* and at the same time provides ample safeguards of the Commission's expenditures. (S. Rep. 1618, 75th Cong., 3rd sess., p. 5.) [Italics supplied.]

The report of the House Committee on Merchant Marine and Fisheries is to the same effect. H. Rep. No. 2168, 75th Cong., 3rd sess., in reporting on the same amendment to Section 207, stated (pp. 17-8):

The amendment is designed to make clear a power which it is thought already exists in the Commission but about which some doubt has been expressed. *Under the act, the Maritime Commission has all the general and implied powers of a business corporation.* * * *

The remainder of the section is unchanged. But, during the committee's consideration of this section, it was developed that some question had arisen as to whether the Comptroller General was authorized, under the general powers granted to him, to prescribe the system of accounts to be kept by the Maritime Commission and *to require that all claims arising out of its activities be settled and adjusted in the General Accounting Office.* Section 207 provides that the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the act of March 20, 1922

(42 Stat. 444). *That act, as construed by the Comptroller General, did not require that all claims arising out of the activities of the Emergency Fleet Corporation be settled and adjusted in the General Accounting Office.* The direction contained in section 207 of audit "according to approved commercial practice as provided in the act of March 20, 1922," has reference to "the usual methods of steamship or corporation accounting" specified by that act. Therefore, the legislative history of section 207, and the context as well, justify the conclusion that Congress, by the enactment of the section with the specific reference to the act of March 20, 1922, intended to make the earlier statute applicable, *at the same time adopting the administrative interpretation which had theretofore been given it by both the Comptroller General and the Emergency Fleet Corporation.* Under the circumstances, therefore, no further clarification of section 207 is required. [Italics supplied.]

Prior to the execution of the Adjustment Agreement under which the stock was transferred by the Dollars, the Government held claims against R. Stanley Dollar personally and Dollar Steamship Line as sureties on the debt of the operating company, in the respective amounts of \$1,750,000 and \$3,500,000. Under the Adjustment Agreement, the Commission accepted title to the stock in compromise and satisfaction of these claims against R. Stanley Dollar and Dollar Steamship Line. The circumstances were appropriate for compromising these Government claims, since although the common stock then had no appreciable value, the Commission may well have concluded that it was at least doubtful whether the suretyship obligations of R. Stanley Dollar and Dollar Steamship Line would have been collectible

if sued on. Furthermore, as we have shown above, acquisition of the stock gave the Government the additional advantages of eliminating the Dollar management and effectuating the Commission's policy of not permitting Government funds to be put at risk to create common stock equities in persons such as the Dollars, who were unwilling to risk their own money to keep the operating company out of bankruptcy.

3. Since the Maritime Commission Had the Authority to Make Contracts in the Same Manner as a Private Corporation, in Furtherance of Its Statutory Functions, It Had Implied Power to Acquire the Stock in Compromise of Claims Against the Dollars.

The Maritime Commission was given authority to contract "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter", so that the Commission (like its predecessor, the Shipping Board) could operate like a private corporation free from the restrictions imposed by law upon Government agencies generally. In the words of the House Committee on Merchant Marine and Fisheries, the Maritime Commission was given, by Section 207 of the Merchant Marine Act of 1936 "all the general and implied powers of a business corporation." H. Rep. No. 2168, 75th Cong., 3rd sess., p. 17 (quoted at p. 13, above).

In *United States v. Standard Oil Co.*, 156 F. 2d 312 (C.A. 9), this Court affirmed a decision taking that broad view of the implied powers of the Maritime Commission. *Standard Oil Co. of California v. United States*, 59 F. Supp. 100, 106 (S.D. Cal.). In that case the District Court held that the War Shipping Administration⁷ had the implied power to create by char-

⁷ During World War II the War Shipping Administration was given by executive order some of the functions of the Maritime Commission. Executive Order 9054 (7 F. R. 837) ; Executive Order 9244 (7 F. R. 7327).

ter party a liability of the United States to pay attorneys' fees. This position that the Maritime Commission had the implied powers of a private corporation was also taken in 40 Op. A.G. 267.

There is no doubt that a private corporation has implied power to settle or compromise claims which it holds. 6 Fletcher, *Cyclopedia Corporations* (1931 ed.), § 2511, pp. 234-5; *Northern Liberty Market Company v. Kelly*, 113 U.S. 199, 202; *Greene County Nat. Farm Loan Ass'n. v. Federal Land Bank of Louisville*, 57 F. Supp. 783 (W.D. Ky.), affirmed 152 F. 2d 215 (C.A. 6).

Hence, the Maritime Commission, having the contracting power of a private corporation, likewise had authority to compromise debts owed it.⁸ This was specifically held by the trial court in the *Dollar v. Land*

⁸ For analogous instances in which a Government agency having, like the Maritime Commission, broad corporate powers has accepted securities in discharge of a debt to the Government, see the Comptroller General's audit report of the Reconstruction Finance Corporation for the fiscal year ending June 30, 1950 (House Doc. 125, 82d Cong., 1st sess., p. 40):

"Securities acquired in liquidation of loan indebtedness consisted of:

Securities accepted in railroad reorganizations (including accrued interest of \$571,748	\$16,962,482
Securities accepted in payment of interest and dividends on loan indebtedness, except railroad reorganizations (including accrued interest of \$13,376)	495,534
Other securities	1,622,322
Total	\$19,080,338

Securities accepted in railroad reorganizations represent obligations of railroads reorganized under the national bankruptcy act, received by RFC in exchange for original loans and securities held prior to the reorganizations. * * *."

litigation. *Dollar v. Land*, 82 F. Supp. 919, 922-3 (D. Col.):

It [the Maritime Commission] was created, from a functional point of view, for the purpose of permitting the conduct of its business in a manner similar to that of private enterprise and free as a consequence of the ordinary inhibitions applied to the regular executive branches of the Government.

Its powers in this respect are similar to that of a business corporation.

* * * if the Commission has the powers of a private business corporation then it has what such an entity certainly impliedly has—the power to compromise claims—even if as in this instance those are claims of the United States. * * *

Similarly, when *Dollar v. Land* first went to the District of Columbia Court of Appeals on the jurisdictional issue as to whether it was an unconsented suit against the United States, that court also construed Section 207 of the Merchant Marine Act of 1936 as granting the Maritime Commission the broad contractual powers of a private corporation. It said (*Dollar v. Land*, 154 F. 2d 307, 311):

We are in agreement with the view taken of this section of the law by the court deciding *Standard Oil Co. of California v. United States*, 59 F. Supp. 100, involving the Maritime Commission. There the provision was treated in the same fashion as those statutes creating corporate instrumentalities for the conduct of public business. While the corporate acts characteristically carry language to the effect that the corporation may “sue and be sued,” we think the comparison is well drawn. It is in harmony with the views of administrative

officials having occasion to consider that section of the law involved in this litigation. For example, though not deciding the extent of contractual freedom conferred upon the Maritime Commission by Section 207 the Attorney General has stated "that section 207 was intended to confer 'all the general and implied powers of a business corporation' (H. Rept. No. 2168, 75th Cong., 3d Sess.) and that it has been construed to authorize departures from the usual rules governing the making of Government contracts when the unusual or business character of the activities involved so require (Comptroller General's Decisions, A-51647, March 27, 1941, and B-15611, January 12, 1942)."

Thus the Maritime Commission seems to stand in much the same relationship to those with whom it contracts under section 207 as do the more formal corporate organizations charged with transacting the government's business. * * *

When *Dollar v. Land* went to the District of Columbia Court of Appeals the second time on the Dollars' appeal from the trial court's conclusion that they had transferred the stock outright, that Court of Appeals did not pass on the legal issue as to whether the Commission had authority to acquire outright title to the stock as incident to its power to compromise or settle claims; it reversed the trial court solely because of its conclusion that the Dollars had pledged the stock. *Dollar v. Land*, 184 F. 2d 245, 249-50:

But the Commission does not say that it has a general power to acquire stock by purchase, apart from its other duties in respect to maritime operations. It says that its power to acquire stock is incident to its power to compromise or settle claims. It can, it says, accept stock in the settlement or compromise of a claim.

The proposition thus presented by the Commission has strong basis. Since the Commission has statutory power to make loans and to manage them, an implied power to accept satisfaction of, or upon proper grounds to settle, the claims thus created seems reasonable and in accord with the usual rules of law. At the same time there is a strong contrary view, based upon decided cases, official opinions, and statutes as to the power to compromise claims for and against the United States. *But we do not decide that question because we do not reach it.* We must first decide whether the acquisition of this stock was part of the compromise or settlement of a claim. [Italics supplied.]

However, when *Land v. Dollar* went to the District of Columbia Court of Appeals for the third time, to review the judgment of the District Court on mandate quieting title to the stock in the Dollars, the Court of Appeals, in flat contradiction of what it had stated in its own previous opinion (just quoted), said (*Land v. Dollar*, 188 F. 2d 629, 631):

The case was returned to the District Court, was tried, 82 F. Supp. 919, and was appealed to this court, and it was here held that (1) the Commission had no power to acquire outright ownership of the stock and (2) the plaintiffs were pledgors.

How the Court of Appeals could have so misread its own prior opinion is an incomprehensible to us as it was to the Dollars.⁹

⁹ In our petition for certiorari to review this latter judgment of the Court of Appeals, we stated: "When this case was before this court on our previous petition for certiorari (No. 353, this Term), the Court of Appeals had explicitly held that it did not decide

In its opinion on the issuance of the contempt citation the Court of Appeals this time correctly described its earlier holding as merely ruling on the pledge issue: "We held that the 1938 transaction was a pledge and directed the District Court to order the return of the shares." *Land v. Dollar*, 190 F. 2d 366, 368, 371 (C.A. D.C.). And finally in its opinion holding Government officials in contempt, the Court of Appeals again correctly described its earlier decision as merely holding that "the transaction of 1938 was a pledge of the shares and not a sale". *Sawyer v. Dollar*, 190 F. 2d 623, 627 (C.A. D.C.).

whether Section 207 of the Merchant Marine Act of 1936 * * * authorized the Maritime Commission to acquire title to the stock * * * Now the court of appeals contradicts its own former opinion and states, 'it was here held that (1) the Commission had no power to acquire outright ownership of the stock * * *.' We suggest that if an administrative agency is to be held to have been in error in construing its basic statute over a 15 year period, it should at least have a decision on that issue rather than a mistaken and enigmatic reading of a prior decision" (Pet. for Cert., p. 18, *Land v. Dollar*, No. 552, October Term, 1950).

In their opposition the Dollars agreed that the Court of Appeals had not passed on the issue of statutory authority. They said: "Petitioners * * * assert that the court below held that Section 207 of the Merchant Marine Act does not authorize the government to acquire outright title to stock in an operating steamship corporation. There is no such holding; no such question is involved. * * * In its decision of July 1950 the court below found that the contract was a pledge. Consequently it said 'we do not decide that question [of the Commission's power to acquire outright title], because we do not reach it' (R. 2147). The present petition (No. 552) not only quotes this clear statement but correctly says 'When this case was before this Court on our previous petition for certiorari (No. 353, this term), the Court of Appeals had explicitly held that it did not decide whether Section 207 of the Merchant Marine Act of 1936 * * * authorized the Maritime Commission to acquire title to the stock.'"

(Brief in Op., p. 20, *Land v. Dollar*, No. 552, October Term, 1950.)

Accordingly, the only real holding by any court in the *Dollar v. Land* litigation on the issue of the Commission's authority to acquire title to the stock is the holding of the trial court that the Commission did have such authority (see p. 17, above).

4. The Acquisition of Title to the Stock Was Authorized as Reasonably Incident to the Commission's Functions as a Government Agency.

Even if the Maritime Commission had not been authorized to enter into contracts with "all the general and implied powers of a business corporation," its acquisition of the stock would be authorized under the general principle that a Government agency has implied powers reasonably incident to the performance of its statutory functions.

The United States as an incident to its general right of sovereignty may enter into contracts "not prohibited by law and appropriate to the just exercise of * * * the constitutional powers confided to it," even though such a contract is not prescribed by any law; and it is **not** essential that the Government officer who enters into such a contract have been given express statutory authority to do so, as long as it is a reasonable incident to the duties of his office. *United States v. Tingey*, 5 Pet. 115, 128; *United States v. Bradley*, 10 Pet. 343, 359-60; *United States v. Linn*, 15 Pet. 290, 298; *Neilson v. Lagow*, 12 How. 98, 107.

In accordance with this principle, a Government official responsible for collection of a claim of the United States is authorized to compromise the debt and accept property in satisfaction thereof. It is not necessary that he be specifically authorized by law to do so. In fact, that power has been exercised "since the foundation of the government." *United States v. Hudson*, 26 Fed. Cas. 411, 412 (C.C.D. Ind.); *United States v. Lane*,

26 Fed. Cas. 861, 862 (C.C.D. Ind.). "The denial of the power to accept properties other than moneys in settlement and compromise would seriously interfere with the exercise of the power of compromise and settlement." 37 Op. A.G. 298, 300.

Thus, for example, the unquestioned authority of the Attorney General to compromise claims which are in litigation is not specifically granted by statute. On the contrary, it is implied from his statutory authority to control and conduct litigation involving the United States (5 U.S.C. 309, 310, 316, 317), and has been exercised by him virtually since the founding of this republic. 2 Op. A.G. 482, 486; 22 Op. A.G. 491, 494; 23 Op. A.G. 507. See 38 Op. A.G. 98; *New York v. New Jersey*, 256 U.S. 296, 308.¹⁰

Government officials and agencies have *implied* powers necessary and appropriate to the administration of their statutory functions and the courts, in considering whether an act by an agency is within its authority, must give due regard to its implied as well as its express powers. *Peoples Bank v. Eccles*, 161 F. 2d 636, 640 (C.A. D.C.).¹¹ Obviously, as stated in *Texas & Pacific Railway Co. v. Pottorff*, 291 U.S. 245, 253, "The measure of their powers is the statutory grant; powers not conferred by Congress are denied," but this means powers expressly or *impliedly* granted by Congress, as

¹⁰ Although this power of compromise was specifically vested in the Attorney General by Executive Order 6166, June 10, 1933 (5 U. S. C. 124-132), he had it as an implied power independent of and long prior to Executive Order 6166. 38 Op. A. G. 98; 22 Op. A. G. 491.

¹¹ *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, for example, held that a corporate government instrumentality had *implied* power to sue and be sued and that Congress had *impliedly* waived its immunity from suit.

is evidenced from that case¹² and from *Inland Waterways Corp. v. Young*, 309 U.S. 517, holding that national banks have implied powers to pledge assets to secure deposits of government corporations. See also *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294, stating that the power of Government officers to dispose of the rights and property of the United States may be either "conferred upon them by Act of Congress or is to be implied from other powers so granted."

The Commission's substantive powers are those granted it by statute, and its implied powers are those reasonably necessary and appropriate for it to administer its substantive powers, just as in the case of any other agency or corporation of the Government. Since, as we have shown *supra*, the Commission, although not a corporation, was intended by Congress to have all the powers of a private corporation, and since the Commission was granted "all the functions, powers, and duties" of the Shipping Board with respect to the ship debts (46 U.S.C. 1112, 1114), it (like the Shipping Board before it and like any private corporation) had the implied power to acquire outright title to the stock in compromise of the liability of R. Stanley Dollar and Dollar of California.

¹² In the *Texas & Pacific Railway* case, the Supreme Court did not merely look to the statute to ascertain whether the claimed authority was expressly vested in the national bank involved. Instead, the Court recognized that the bank might have implied, in addition to express, powers; and its refusal in this instance to imply the power to pledge assets to secure private deposits was based on the grounds, among others, (1) that had not been the practice of national banks (291 U. S. at 254), and (2) it would result in unequal treatment of private depositors, and hence be inconsistent with the provisions of the National Bank Act (291 U. S. at 255-256).

5. Appellees' Arguments Against the Commission's Authority to Acquire Title to the Stock Are Unsound

We have answered above many of appellees' arguments on this issue. We here dispose of the other authorities cited in appellees' brief.

The objective of 41 U.S.C. 11 is "to prevent executive officers from involving the Government in *expenditures or liabilities* beyond those contemplated and authorized by the law-making power." 21 Op. A.G. 248. [Italics supplied.] Acquisition of the stock did not involve the Government in expenditures or liabilities. But even where Government officials make commitments of Government funds, the doctrine of implied powers operates. *Burns v. United States*, 160 Fed. 631, 634 (C.A. 2); 40 Op. A.G. 69; 37 Op. A.G. 288; 21 Op. A.G. 1; see also *United States v. Threlkeld*, 72 F. 2d 464 (C.A. 10).

In *Pan American Petroleum and Transport Company v. United States*, 273 U.S. 456; and *Mammoth Oil Company v. United States*, 275 U.S. 13, the lease of Government property involved was invalid because it was procured by corruption and fraud and was in direct conflict with the policy of the statute involved. Furthermore, the lease was made by the Secretary of the Navy, not by an agency such as the Maritime Commission which Congress has given the freedom of operation of a private corporation.

In *United States v. Tichenor*, 12 Fed. 415, 422 (C.C. D. Ore.), the court said, "It is not claimed that there was any law authorizing any one to purchase this property * * *." Of course, we claim Section 207 of the Merchant Marine Act of 1936 as authorizing acquisition of the stock.

4 Op. A.G. 600; 9 Op. A.G. 18; and 15 Op. A.G. 235 merely hold the obvious that where Congress has appropriated a specific sum for a project, Government offi-

cers are not authorized to spend more than that sum. Interestingly enough, 31 Op. A.G. 597 held that the Secretary of the Interior was authorized to acquire stock of a railroad corporation, although this power had to be *implied* from the statute involved.

Detroit Citizens' Street Ry. Co. v. Detroit Railway, 171 U.S. 48, 53, held that a municipal corporation did not have implied authority to grant a perpetual monopoly for the use of its streets. The court expressly pointed out that in such a case authority by implication should be very strictly limited to avoid future paralysis of public functions.

31 U.S.C. 198 merely specifies the types of currency which shall be legal tender in the payment of debts due the United States. It does not deal at all with the power to compromise such debts.

Appellees argue (Brief, pp. 105-6) that the Congress has confined to the Secretary of the Treasury the power to compromise debts due the United States, citing 31 U.S.C. 194. They refute their own argument, however, by conceding that as to claims in litigation the Attorney General, not the Secretary of the Treasury, has the implied power of compromise (Appellees' Brief, p. 107). The fact that the compromise power is not vested exclusively in the Secretary of the Treasury is further manifested by the fact that 31 U.S.C. 194 is in terms no more all-embracing than is the statutory power of the Comptroller General to settle and adjust "all claims and demands whatever by the Government of the United States or against it." 31 U.S.C. 71. Yet the Comptroller General's authority to settle and adjust claims does not extend to the Maritime Commission or its predecessors, the Shipping Board and the Emergency Fleet Corporation (see pp. 10-4, above). For the same reason, the Secretary of the Treasury's compromise power

does not affect the Commission's power of compromise.¹³

Furthermore, there are other implied exceptions to the Secretary of the Treasury's power of compromise under 31 U.S.C. 194. See 34 Op. A.G. 108 holding that authority to compromise liability on a loan made to a railroad under Section 210 of the Transportation Act, 1920 is impliedly vested in the Interstate Commerce Commission; and 38 Op. A.G. 381 holding that authority to compromise liability for an offense under the Harrison Narcotic Act (38 Stat. 725, 26 U.S.C. 2550) committed in Puerto Rico is impliedly vested in the Government of Puerto Rico.

Pointing to three instances in which Congress in the original Merchant Marine Act and in amendments has made express provision for Commission authority to compromise certain types of claims, the Dollars argue (Brief, pp. 107-9) that under the maxim, *expressio unius est exclusio alterius*, no general authority in the Commission to settle debts owed to it should be implied from Section 207. Apart from the fact that this maxim can have no application to the implied powers of a Government agency or corporation,¹⁴ examination of these provisions reveals that they fall into two categories, neither of which precludes such implication of the power.

¹³ Since the claim here involved is not one arising under the tax laws, it is immaterial whether the method prescribed in 26 U.S.C. 3761(a) for compromising such claims is exclusive. Hence *Botany Worsted Mills v. United States*, 278 U.S. 282; and *George S. Colton etc. Co. v. White*, 16 F. Supp. 726 (D. Mass.) have no application here.

¹⁴ By definition, an implied power is never "expressio." To apply that maxim to implied powers would necessarily eradicate the whole doctrine of implied powers.

The first category, which includes 46 U.S.C. 1141, 1142, involves the situation where Congress limited the Commission's authority to settle claims arising out of the cancellation of all ocean mail contracts and prescribed procedures for such settlements, including resort to the Court of Claims. Of course, where Congress decides to impose restrictions and limitations upon the compromise power of the Commission, it is necessary for the conditions and procedures to be spelled out by express statutory provision. Such spelling out, however, has no bearing on the Commission's compromise power in other areas of its activities.

The second category deals with situations where Congress vested the Commission with new and additional functions, i.e., the 1938 amendment adding the new Federal Ship Mortgage Insurance Title and the 1940 amendment adding the "Insurance" function to Title II. The provision in these amendments authorizing the Commission to settle claims arising thereunder is no different in purpose from the 1938 amendment to Section 207, which, as we have shown, *supra*, was enacted, not because the Commission did not by implication have the authority expressly enacted but rather, to remove by express enactment any possibility of doubt that the Commission had that power with reference to these new duties and functions. As the Senate Committee stated with regard to the amendment to Section 207: "It is believed that such authority already exists in the Commission, but the amendment is recommended in order to remove any doubt that the Commission possesses the power to advance or expend for such purposes when found necessary" (S. Rep. 1618, 75th Cong., 3rd sess., p. 5). The same view is expressed in the House Report (H. Rep. 2168, 75th Cong., 3rd sess., p. 17). By the same token, Congress' express authorization to the Commission to compromise claims arising out of the

performance of these new duties and functions does not indicate that the Commission did not already have the power in regard to its other activities.

No inference as to a lack of implied power in the Maritime Commission to compromise claims may be drawn from the fact that Congress has in certain cases specifically authorized the heads of Government departments and agencies to make such compromises (Appellees' Brief, p. 110). Such department and agency heads, unlike the Maritime Commission, have not been authorized by Congress to act like a private corporation free from the restrictions imposed by law upon Government agencies generally.

In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380; and in *Regional Agricultural Credit Corporation v. Stewart*, 69 N.D. 694, 289 N.W. 801, cited in Appellees' Brief (p. 111), the power purported to be exercised by an agent of a government corporation was *expressly* prohibited by regulations. Of course no Government agent can have implied power to do that which is expressly prohibited.

Although 46 U.S.C. 1116, providing that the proceeds of debts transferred to the Commission shall be deposited in the Treasury for a revolving fund, obviously relates only to money proceeds, it by no means follows that that provision of law was intended to limit the Commission to receiving money rather than property in settlement of claims. So to construe it would not only create a conflict with 46 U.S.C. 1114, which gave the Commission "All the functions, powers, and duties" of the Shipping Board with respect to the ship debts, but would "seriously interfere with the exercise of the power of compromise and settlement. 37 Op. A.G. 298, 300.

Similarly, Sections 202 and 206 of the Merchant Marine Act (46 U.S.C. 1112, 1116) do not support the Dol-

lars' contention (Appellees' Brief, p. 112). The fact that Section 202 transferred to the Commission "all money, notes, bonds, mortgages, and securities of every kind, contracts and contract rights, lands, vessels, docks, wharves, piers, and property and interests of every kind, owned by the United States" of the Shipping Board, does not make the Maritime Commission merely a "conservator" or "receiver" of such debts in the sense that the Commission had only the powers of a "receiver" in regard thereto, and consequently was required to liquidate these assets into money. Not only does the transfer of these assets not indicate that the Commission was merely to "conserve" them, but taken together with Section 204 (46 U.S.C. 1114), providing for the transfer to the Commission of all of the Shipping Board's "functions, powers and duties" these sections make it clear that by virtue of that transfer, the Commission was to continue, rather than to liquidate operations. And as we have pointed out, *supra*, since the Shipping Board had authority to settle claims, the Commission as its successor under Section 204 likewise had that authority.

The 1938 amendment of Section 202 does not show that the Commission lacked power to compromise debts (Appellees' Brief, p. 113). That Section was amended so as expressly to give to the Commission authority to extend and renew, in accordance with sound business practice, notes and mortgages transferred to the Commission from the Shipping Board (46 U.S.C. 1112) and was occasioned by the fact that Section 5 of the Merchant Marine Act, 1920 (41 Stat. 990-1), expressly required ships sold by the Shipping Board to be paid for in not more than 15 years. The amendment was thus necessary to remove an *express* limitation on the powers of the Commission as transferee of the Shipping Board. See S. Rep. 1618, p. 5, and H. Rep. 2168, p. 16. That

proves nothing as to the scope of the Commission's *implied* authority to accept property in compromise. Of course, no Government agency or private or public corporation has any implied power to do something expressly restrained by law. But the Merchant Marine Act contains no express statutory limitation on the power of the Commission to compromise debts.

Appellees' reference (Brief, p. 114) to various statutory provisions (46 U.S.C. 1158, 1243) giving the Commission authority to sell property under prescribed conditions and subject to prescribed limitations proves nothing. These statutes were necessary to impose Congressionally desired limitations upon the power granted.

Congress has, in the statutes cited by appellees (Appendix to Brief), granted the Commission certain substantive powers and has frequently prescribed the conditions under which they may be exercised. That certainly does not negate the Commission's implied powers, any more than the prescribing by statute or charter of the powers of a private corporation negates its implied powers.

Statutes cited by appellees (Appendix to Brief) giving the Commission power to dispose of property under certain circumstances have no relevance here. Discharging a liability by compromise is no more a disposition of Federal property; i.e., the chose in action, than would be a discharge by acceptance of payment in full. Furthermore, Congress frequently deems it advisable for a statute to spell out expressly what would be implied in law anyway, in order to eliminate doubts and contentions, however ill-founded. See the discussion above as to the 1938 amendment to Section 207 of the Merchant Marine Act, 1936; *United States v. Cors*, 337 U.S. 325, 331-2, so construing Section 902 of the Act

(46 U.S.C. 1242) ; and *Mason v. United States*, 260 U.S. 545, 558-9.

Provisions such as the 1938 amendment adding Section 215 to the Act (46 U.S.C. 1125), authorizing the Commission to purchase vessels with its funds do not indicate that the Commission lacked the implied power to accept property in compromise of claims. Acquisition of property as an incident to compromise is by no means the same as the Commission's expending its funds to buy such property. Thus the authority of the Secretary of the Treasury or of the Attorney General to accept property in compromise of claims within their respective jurisdictions (see 37 Op. A.G. 298) is obviously entirely unaffected by any question as to whether or not they have authority to buy property with Government funds. Furthermore, the enactment of 46 U.S.C. 1125 may be considered as necessary to *restrict* by the limitations therein stated the existing broad implied power of the Commission to purchase vessels.

The final argument advanced by the Dollars (Appellees' Brief, pp. 119-22) is that the transfer to the Commission of title to the stock in exchange for the release of R. Stanley Dollar and Dollar Steamship Line from their suretyship liabilities "could not possibly be called a compromise."

The debts which were compromised were the suretyship liabilities of R. Stanley Dollar and Dollar Steamship Line on the ship mortgage notes. This liability in the case of Mr. Dollar was \$1,750,000 and in the case of Dollar Steamship Line was \$3,500,000. In the event of default on the ship mortgage debts, the Government could have brought suit against Mr. Dollar and Dollar Steamship Line directly on the ship notes, without having to first foreclose the mortgages and merely obtain

deficiency judgments. 3 *Jones on Mortgages* (8th ed.), §§ 1572, 1573, pp. 7-9.¹⁵

Mr. Dollar and Dollar Steamship Line transferred their stock to the Commission in order to eliminate the risk that they might have to make good on their share of personal liability on the ship notes. That was a real risk at the time, for Mr. Dollar, in reporting on the Adjustment Agreement to the stockholders of Dollar Steamship Line, said: "The Maritime Commission was in a position to foreclose its various mortgages aggregating some \$7,000,000 and to obtain a deficiency judgment, part of which would be collectible against this Company" (J. A. 1669). Contrary to Appellees' Brief (p. 121), we do not now and never have conceded that the mortgaged ships would bring at a foreclosure sale enough to pay off the debt without resorting to the personal liabilities on the notes.¹⁶

There is no showing in the District of Columbia record that the Government could have collected on the liabilities of Mr. Dollar and Dollar Steamship Line if it had sued them on the notes. The probability was that

¹⁵ The California Code of Civil Procedure, § 726, may limit the mortgagee's remedy to that of foreclosure and deficiency judgment, but this is merely a procedural provision applicable to the California courts, not to a suit in a Federal Court. *Maxwell v. Ricks*, 294 Fed. 255 (C.A. 9). And in any event the rights and obligations of the parties under the ship notes and mortgages were determined by Federal, not State law. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366; *United States v. County of Allegheny*, 322 U.S. 174, 182-3.

¹⁶ The only appraisal of the value of the mortgaged ships as of 1938 contained in the District of Columbia record is that of Captain Pillsbury. He gave \$13,700,000 as the sum total of the values of the 13 ships if sold individually, "using prudent business methods of selling," "not on a forced sale" (J.A. 1233-5). That value, of course, had no relation to what the ships might be expected to bring at a mass foreclosure sale.

if the Government had refused to put millions of dollars of new money into the operating line and it had thus been forced into bankruptcy, the whole interrelated Dollar empire would have crashed. Hence the situation was an appropriate one from the standpoint of the Maritime Commission for compromising the suretyship liabilities.

Of course, the obligation of the operating line as principal debtor to the Government on the ship notes was not compromised. There was no reason for the operating company to object that the amount of *its* debt to the Government was not reduced by the stock transfer. It was liable for the entire \$7,500,000 debt and would have been obligated to reimburse Mr. Dollar and Dollar Steamship Line for any amount which they, as its sureties, might pay on the debt. *Restatement of the Law of Security*, comment to § 135, p. 367. Hence the compromise of the liability of Mr. Dollar and Dollar Steamship Line was of no concern to the operating line one way or another.

Although some of the Dollar interests which transferred stock to the Commission were not themselves liable on the ship notes, the circumstances made it obviously sensible for them to transfer their holdings of stock in the operating line, which then had no value any way. For all of the transferors of stock (except Mortimer Fleishhacker) continued to hold substantial preferred stock interests in the operating line, either directly or through affiliated corporations, and Mr. Dollar was in a position to dictate their decisions anyway (J. A. 1609-10, 1614-7, 1618-24, 1626-30, 1715-8). Mortimer Fleishhacker was chairman of the board of directors and a stockholder of the Anglo Bank (J. A. 1327) which stood an excellent chance to lose the \$1,800,000 owed it by the operating line if the Government should

refuse to finance the latter to keep it out of bankruptcy (J. A. 1853).

Accordingly, from the standpoint of all interested parties, the outright transfer of the stock for the release of Mr. Dollar and Dollar Steamship Line was a sensible compromise transaction.

Contrary to Appellees' Brief (pp. 119, 121), the District of Columbia Court of Appeals never held that the transaction *could not* be a compromise. It merely concluded (erroneously we submit) that the transaction in fact was not a compromise.

III.

The Authority of the Maritime Commission to Acquire Title to the Stock Has Been Ratified by Congress.

Even if there were any doubt that, as a matter of *a priori* statutory construction, the Maritime Commission was authorized to acquire title to the stock, any such doubt would be dissipated by the subsequent action of Congress, which confirms the Commission's construction of its statutory powers and constitutes a ratification of its action in acquiring this stock as the agent of Congress in the administration of the Merchant Marine Act of 1936.

Since 1938 Congress has repeatedly been informed and has recognized that the Maritime Commission acquired title to the stock. The 1938 annual report of the Maritime Commission to Congress discussed the situation leading up to the Adjustment Agreement of August 15, 1938, and stated (p. 11):

On August 15, 1938, an agreement for reorganization was approved whereby the Commission acquired about 90 percent of the outstanding common stock of the Dollar Line, in consideration for releasing R. Stanley Dollar and the Dollar Steamship Company of California from their liabilities

as endorsers or comakers on the ship mortgage notes held by the Commission.

This adjustment plan was consummated in October 1938 and the Commission as majority stockholder obtained complete control in the selection of the management.

This excerpt from the 1938 annual report is set forth in the Congressional Record, with the comment by Congressman Dirksen: "Ninety percent of the stock gives the Maritime Commission control of the new line. We the people are therefore in the shipping business." 86 Cong. Rec. 4443-4.

The Commission's 1939 annual report to Congress stated (p. 10):

In its last annual report the Commission outlined the steps taken to reestablish service on the important trade routes formerly operated by the Dollar Steamship Lines Inc. Ltd. This resulted in a plan for adjustment of the company's indebtedness being consummated in October 1938, with the Commission as majority stockholder of a successor corporation, American President Lines, Ltd.

In addition, on April 10, 1939, the Commission transmitted to Congress an elaborate printed report on the reorganization of American President Lines and the negotiations leading up to it, which contained copies of the agreement under which the stock was transferred and of the various subsidiary contracts, resolutions and legal opinions.¹⁷ This report referred to the Commis-

¹⁷ Report of the Maritime Commission to Congress, entitled "Reorganization of American President Lines, Ltd."

In addition to the regular transmittal to Congress, copies of the report were sent individually in September 1939 to all 20 members of Senate Committee on Commerce and all 23 members of the House Committee on Merchant Marine and Fisheries.

sion's determination in June, 1938, "to negotiate with the Dollar interests for the acquisition of substantially all the common stock of" the operating line (pp. 7, 8), and the Commission's conclusion that the "fundamental causes" for the line's critical position were "unsatisfactory management." The report detailed the transactions by which the Dollars drained millions of dollars from the operating line and stated that "* * * every conceivable device was adopted to drain the earnings and the working capital from the company as rapidly as possible" (pp. 12-6).

This 1939 report also pointed out that:

Under the present adjustment plan which the Commission has already approved, the last grasp of the "controlling interests" upon the management is to be relinquished. The divorcement of these interests from any control over the affairs of the Company, which was partly effected in January of this year, will, upon consummation of the present plan, be made absolute * * * A policy of the Commission considering itself simply as a creditor and large stockholder of the company, may properly be maintained. (pp. 50, 52).¹⁸

This 1939 report to Congress set forth a report by the Commission's General Counsel in which he stated (pp. 60-3, 67):

¹⁸ This portion of the report speaks in the future tense because it was written in September 1938, before the stock was actually transferred. This statement of the Commission's conclusions as to the Dollar management and its policy to eliminate the Dollars from the operating line had previously been transmitted by the Commission, on October 6, 1938, to all members of the Senate Committee on Commerce and of the House Committee on Merchant Marine and Fisheries.

From the very early stages of the negotiations which ultimately led to the plan for a long-term financial rehabilitation of Dollar of Delaware, it was recognized that effective voting control of the company must be obtained by the Commission. Prior to June of 1938 it was thought that such voting control might take the form of a voting trust or a pledge of the stock accompanied by rights of the Commission to vote the pledged stock. But in June 1938 it became evident that no financial guarantees from the so-called Dollar interests as required by the Commission under its resolution of June 4, 1938, would be forthcoming as a consideration for the Commission subordinating its first preferred ship mortgages in order to permit the Dollar interests to secure a working capital loan upon a first mortgage. *The Commission did not consider it appropriate in extending financial aid to maintain an essential foreign trade route, to create common stock equity values in favor of persons who were unwilling themselves to assume any financial obligations whatever.*

Consequently, pursuant to an offer of Dollar of California to transfer certain of its stock to the Commission, it *undertook negotiations for the acquisition of the beneficial interest in the stock belonging to the Dollar interests.* This contemplated the acquisition of all the class B stock of Dollar of Delaware, which stock in and of itself carried the control of the company, and as much of the class A stock as was available. * * *

All the stock listed [2,100,000 class B shares and 115,426 class A shares] * * * was acquired by the Commission.

* * * * *

* * * In my memorandum to the Commission dated July 20, 1938, I advised the Commission on certain fundamental legal questions involved as follows:

(a) The Commission might legally acquire the stock of Dollar of Delaware under the conditions outlined in the memorandum.

(b) Such acquisition of stock would not jeopardize the Commission's rights as mortgagee.

(c) The Commission might grant an operating differential subsidy to Dollar of Delaware *even though a substantial majority of its stock were owned by the Government.*

* * * * *

In my opinion the Commission received *valid title* to 2,100,000 shares of class B stock and to 63,380 shares of class A stock, free and clear of liens. * * * It also received as transferee *all the right, title, and interest* of R. Stanley Dollar as pledgor in 33,600 shares of class A stock * * * subject, however, to the liens of such pledges as existed on October 26, 1938. [Italics supplied.]

In addition, the 1939 report to Congress set forth opinions by the Commission's special San Francisco counsel stating: " * * * upon transfer of the certificates * * * the Commission will acquire *legal and valid title to such stock and the rights incident to such stock ownership*, free and clear of all liens and encumbrances" and that " * * * the Commission *through stock ownership* controls Dollar of Delaware" (pp. 156, 212). [Italics supplied.] The report also set forth the legal opinion rendered by counsel for the Dollars that delivery of the stock certificates "will convey to the Commission * * * valid title to the shares of

stock * * * free and clear of any liens or encumbrances whatsoever” (p. 159).¹⁹

In 1939 the House Committee on Merchant Marine and Fisheries stated, in a report on a bill to amend the Merchant Marine Act of 1936 (H. Rep. 71, 76th Cong., 1st sess., pp. 6-7):

* * * The committee is advised that the transaction whereby the Commission acquired approximately 90 percent of the stock of the American President Lines, Ltd., was negotiated. * * * *In the case of the American President Lines the Maritime Commission owns approximately 90 percent of the stock in the operating company and through a mortgage owns a large equity in the ships.* * * * [Italics supplied.]

On August 1, 1944, the Joint Committee of Congress on Reduction of Nonessential Federal Expenditures issued a comprehensive printed report on Government corporations (Sen. Doc. 227, 78th Cong., 2d sess.). This report divided “Government corporations” into three groups: (a) 40 “whose activities are supervised by government agencies”; (b) 4 “independently operated corporations”; and (c) 11 “in which the Government may have a proprietary interest or a contractual relation” (p. 2).

¹⁹ Subsequent to the institution of the *Dollar v. Land* litigation the Maritime Commission’s annual reports to Congress have stated that “the Government’s title to this stock is being questioned at law by R. Stanley Dollar and others.” Maritime Commission Annual Report for 1946 (p. 35); Report for 1947 (p. 36).

Also, in 1947 counsel for the Commission told the House Appropriations Subcommittee: “The American President Line was operated on a subsidy before the war, and the Government owns about 83 percent of the common stock.” Hearings before a subcommittee of the House Committee on Appropriations on the Independent Offices Appropriation Bill for 1948, Part, 2, p. 678.

This Senate Document, under the heading “CORPORATIONS CREATED PRIVATELY OR QUASI PRIVATELY AND WITH WHICH THE GOVERNMENT MAY HAVE A PROPRIETARY INTEREST OR A CONTRACTUAL RELATION,” listed 11 corporations, the second of which was American President Lines, Ltd., with the following statement:

American President Lines, Ltd.—This is a Delaware corporation created in 1929, and in 1938 the United States Maritime Commission acquired class A and class B stock in nominal value \$2,666,303. This represents approximately 93 percent of the voting power and approximately 76 percent of the common stock equity, but is junior in equity to 34,189 shares of 5-percent noncumulative preferred stock with a par value of \$100 per share. No cash was paid by the Commission, the *acquisition* resulting from a settlement of accounts between the Dollar Steamship Line and the Commission. Consideration is being given to the *possibility of bringing about private ownership of the lines* at an appropriate time. A special report of the United States Maritime Commission on the reorganization of the American President Lines, Ltd., was transmitted to Congress on April 10, 1939. (p. 21.)²⁰

In April 1945, Admiral Land, Chairman of the Commission, and William Radner, its general counsel, testified before the House Appropriations Subcommittee on the Government's ownership of the stock as follows

²⁰ The District of Columbia Court of Appeals in its opinion on the contempt order inexplicably stated that this Senate Document did *not* list American President Lines as a corporation in which the Government has a proprietary interest. *Sawyer v. Dollar*, 190 F. 2d 623, 643 (C. A. D. C.). See our original brief, p.52, footnote 39.

(Hearings before subcommittee of the House Committee on Appropriations on the National War Agencies Appropriation Bill for 1946, p. 389):

MR. WIGGLESWORTH. Ninety percent of the stock of this company [American President Lines] *belongs* to the Maritime Commission, does it not?

ADMIRAL LAND. The Commission *owns* about 90 percent of the voting stock control.

MR. TABER. How much of an interest do you have in that company? Any, really?

ADMIRAL LAND. We *own* that much of the stock, sir.

MR. TABER. Of voting stock; but how much, upon dissolution, would you be entitled to?

MR. RADNER. About 80 percent of the assets allocable to the common stockholders' interest, after providing for the preferred stock. *About 80 percent of the common stock equity belongs to the United States.* According to the last published statement the book value of 80 percent of the indicated equity allocable to the common stock would be over \$9,000,000. [Italics supplied.]

On August 1, 1945, the Senate printed a report by the Comptroller General on Government corporations, made pursuant to the Act of February 24, 1945 (59 Stat. 5, 6), which required the Comptroller General to audit and report on "all Government corporations." Reference Manual of Government Corporations—General Accounting Office—As of June 30, 1945 (Sen. Doc. 86, 79th Cong., 1st sess.). This Senate Document contained the following statement about American President Lines (pp. 1, 2):²¹

²¹ In this connection the following statement in the Comptroller General's foreword to his report is significant: "While not all the corporations represented here are Government corporations in the

In 1938, in connection with the reorganization of Dollar Steamship Lines, Inc., Ltd., the United States Maritime Commission *acquired* 113,206 of 252,000 issued shares of the class A stock and all of the 2,100,000 shares of class B stock of the corporation. The Commission relied upon section 207, act June 29, 1936, as amended (52 Stat. 954), as authority for such action.

* * * The stock held by the Commission represents approximately 93 percent of the voting power and approximately 79 percent of the common-stock equity but is junior to 34,189 shares of 5 percent noncumulative preferred stock with a par value of \$100 per share. No cash was paid by the Commission for its stock, but R. Stanley Dollar and Dollar Steamship Line (California corporation) were released from liability with respect to certain mortgage obligations of Dollar Steamship Lines Inc., Ltd., to the Commission.

On July 6, 1943, the United States Maritime Commission *announced that it was giving consideration to the possibility of bringing about private ownership of the American President Lines, Ltd., at the appropriate time, and that parties who desired to submit comprehensive and definite proposals should place them in the hands of the Commission not later than September 15, 1943. However, information received informally from the Commission is to the effect that all bids were rejected by the Commission.*

strictest sense of the term, all were deemed of sufficient importance, because of Government ownership, control, or financial or contractual interest, to warrant the inclusion thereof in this manual. It should be pointed out especially that the inclusion or exclusion of a particular corporation is not equivalent to a determination that it is or is not a 'Government corporation' within the meaning of the act of February 24, 1945."

The administrative expenses of the corporation are paid from its corporate funds, and are not subject to the control of the Bureau of the Budget or Congress.²²

No accounting is rendered by the corporation to the General Accounting Office. However, in connection with the audit of the financial transactions of the Maritime Commission, pursuant to section 207 of the Merchant Marine Act of 1936 (49 Stat. 1988, as amended; 46 U. S. C. 1117), the General Accounting Office has made an examination of the accounts and records of the corporation covering the period January 25, 1938, to December 31, 1940. [*Italics supplied.*]²³

In November 1945, Admiral Land, as Administrator of the War Shipping Administration, wrote a letter to the Chairman of the House Committee on Merchant Marine and Fisheries commenting on a pending bill (H. R. 3802) in which he stated:

* * * This bill is designed to amend Public Law 41 so as to authorize the Administrator to pay to shippers sums collected by or for the account of *any corporation more than 75 percent of the outstanding stock of which is owned by the United*

²² In this connection a footnote in the report stated: "This Corporation is not among those listed in S. 469 and H. R. 3660, 79th Cong., providing for financial control of Government corporations" (p. xii).

²³ The District of Columbia Court of Appeals was also in error in its statement that if Congress knew that the Commission had acquired ownership of the American President Lines stock, Congress' failure to include that corporation in the Government Corporation Control Act (31 U. S. C. 841) would indicate "Congress intended to make one single exception to its general legislation concerning the financial control of corporations of which the United

*States as freight on such frustrated voyages as if the freights had been collected by the Government. Insofar as the War Shipping Administration is aware the American President Lines is the only corporation that would be within the terms of the bill. * * ** [Italics supplied.]

And in connection with the same bill Mr. Macauley, Acting Chairman of the Maritime Commission, on March 22, 1946, wrote the Chairman of the House Committee on Merchant Marine and Fisheries as follows:

The designed objective of H. R. 3802 is to further supplement Public Law 41, by an amendment thereto whereby freights collected on voyages within the contemplation of that act by *corporations, 75 percent of the stock of which is owned by the Government*, shall be considered as having been collected by or for the account of the Government.

The American President Lines, Ltd., is a private corporation incorporated under the laws of the State of Delaware and is *the only corporation of which the Maritime Commission owns stock* within the purview of the bill. The Maritime Commission having acquired, through the reorganization of the Dollar Steamship Lines, Inc., Ltd., 72 percent of the common stock equity and

States is part owner.” *Sawyer v. Dollar*, 190 F. 2d 623, 643 (C. A. D. C.).

The simple fact is that Congress chose not to include in the Government Corporation Control Act not merely American President Lines but nine others of the 11 corporations “with which the Government may have a proprietary interest,” as listed in Senate Document 227, pages 21-3. Congress also excluded from the coverage of that act 13 “government corporations” (in addition to American President Lines) listed in Senate Document 86, *supra*.

approximately 93 percent of the voting stock while *the balance of the stock is and has been owned by private interests.* [Italics supplied.]

House Document 689, 79th Cong., 2d sess., is an audit by the Comptroller General of the accounts of the Maritime Commission for the fiscal year ending June 30, 1944. It lists as an asset of the Commission "Miscellaneous securities . . . \$2,666,030" and explains that that amount has been added to the Commission's capital as an adjustment of the book value of "certain stock turned over" to the Commission "under the reorganization plan of the Dollar Steamship Lines" to the book value as shown in American President Lines' financial statement of June 30, 1944 (pp. 7, 12).

On April 18, 1947, the Comptroller General transmitted to the House and Senate, as well as to the Chairman of the Independent Offices Subcommittee of the House Committee on Appropriations, the Comptroller General's audit of the accounts of the Maritime Commission for the fiscal year ending June 30, 1945. One of the assets of the Commission shown in this audit is "Investments (Common Stock of American President Lines, Ltd.;—113,206 Shares, Class 'A' @ \$5.00; 2,100,000 Shares, Class 'B' @ \$1.00) . . . \$2,666,030,00."²⁴

²⁴ The Comptroller General's annual audits of the Maritime Commission and the Maritime Administration for periods subsequent to the institution of *Dollar v. Land*, refer to the stock and set forth the then current status of the litigation. Thus, the audit for the fiscal years ending June 30, 1948 and 1949 states: "The Maritime Commission is the owner of 93 percent of the voting stock of American President Lines, Ltd. * * * No dividends have been paid on the class A or the class B stock during the time the Commission has owned the stock." This report referred to the trial court's opinion sustaining the Government's title (House Doc. 465, 81st Cong., 2d sess., pp. 59-60).

The 1950 audit referred to the Secretary of Commerce as the "holder" of the stock, pointing out that the District of Columbia

In addition, many other communications between the Maritime Commission and members of Congress since 1938 reveal that the Government's ownership of the stock has been brought to the attention of and has been recognized by members of Congress.²⁵

Thus, Congress has many times been informed, and has itself recognized, that the stock was transferred by the Dollars outright, not in pledge. If Congress had any question as to the propriety of this action of the Commission, it could easily have amended Section 207 to make it clear that the Commission did not have the asserted power.²⁶ The facility with which corrective action could have been taken is demonstrated by the fact that between 1938, when the transfer occurred, and 1945, Congress amended the Merchant Marine Act of 1936, no less than sixteen times.²⁷

Court of Appeals on July 17, 1950, reversed the trial court. The audit report stated: "Ownership of the stock will not be settled until a final determination is made by the courts" (House Doc. 93, 82d Cong., 1st sess., pp. 98-9).

²⁵ The appendix to this brief (pp. 58-84, below) sets forth 15 such congressional letters.

²⁶ Note also that Congress has left unchanged the provision in Section 9 of the Shipping Act of 1916 (39 Stat. 728, 730, 46 U. S. C. 808) which authorizes "vessels owned by any corporation in which the United States is a stockholder" to engage in the coastwise trade.

²⁷ Act of August 4, 1939 (53 Stat. 1182); Act of August 7, 1939 (53 Stat. 1254); Joint Resolution of May 14, 1940 (54 Stat. 216); Joint Resolution of June 11, 1940 (54 Stat. 306); Act of June 29, 1940 (54 Stat. 689); Act of October 10, 1940 (54 Stat. 1106); Act of June 23, 1941 (55 Stat. 259); Act of March 6, 1942 (56 Stat. 140); Act of March 14, 1942 (56 Stat. 171); Act of April 11, 1942 (56 Stat. 214); Joint Resolution of June 16, 1942 (56 Stat. 370); Act of March 24, 1943 (57 Stat. 45); Act of June 17, 1943 (57 Stat. 157); Act of April 24, 1944 (58 Stat. 216); Act of September 30, 1944 (58 Stat. 758); Act of December 23, 1944 (58 Stat. 920).

Congress has not only seen fit to leave Section 207 unchanged since the Commission's acquisition of the stock, notwithstanding congressional knowledge that the acquisition was one of outright title. In 1944 Congress reaffirmed the broad scope of the powers vested in the Commission by Section 207, including the power to settle claims. The Senate Committee on Commerce, in reporting on H. R. 3257, 78th Congress, which dealt, *inter alia*, with a proposed amendment to give the Maritime Commission express authority to pay and settle certain types of claims, made the following comment (Sen. Rep. No. 789, 78th Cong., 2d sess., p. 5) :

There are two other questions involving settlement of claims which were presented to your committee, but it is not believed legislation is necessary in either case. The first question relates to claims for damages to shore structures such as docks and terminals involved in collisions with vessels of the War Shipping Administration. It appears to have been a well-established precedent reaching back to the World War I period for the Government agencies entrusted with ship operations to insure commercially against damage to shore structures, irrespective of the question of possible Government immunity from suit for such damage, because of the possible liability of masters or agents for the vessels involved, or other persons whose liability would have to be indemnified by the United States. *In view of the broad powers which the Administrator exercises under section 207 of the Merchant Marine Act, 1936, and the established administrative practice in this connection, it is believed that legislation in this connection is not necessary.* [Italics supplied.]

Congress has thus plainly ratified the Commission's action in acquiring outright title to the stock. So even if any doubt existed in 1938 as to the Commission's authority to acquire title to the stock, Congress has removed any such doubt. *Brooks v. Dewar*, 313 U.S. 354, 361; *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147.

IV.

Appellees' Arguments in Support of "Collateral Estoppel" Are Unsound.

Appellees' brief (p. 21) concedes that the Attorney General's defense of *Land* and the other commissioners in *Dollar v. Land* "could have had no special significance" on the collateral estoppel issue up to the decision in *Land v. Dollar*, 330 U.S. 731, because up to that time the question as to whether the suit was an unconsented suit against the United States was still in issue. That concession demolishes the Dollars' entire argument, for the question as to whether *Dollar v. Land* is an uncontested suit against the United States *is still in issue*. As stated in *Land v. Dollar*, 330 U.S. 731, 738-9: "If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States." The issue of ownership of the shares is still pending before the Supreme Court on our petition for reconsideration of denial of certiorari to review *Dollar v. Land* on the merits. *Land v. Dollar*, No. 353, October Term, 1950.

That is the kind of case where the question of jurisdiction depends on the decision of the merits. So the Department of Justice is still litigating the jurisdictional issue, and by the Dollars' own concession such action by the department is of no significance on the issue of collateral estoppel before this Court. These, we believe are the "special circumstances" referred to by Mr. Justice Douglas in *Georgia R. Co. v. Redwine*,

342 U.S. 299, 307, which prevent *Dollar v. Land* from concluding the United States.

Furthermore, as we show in our original brief, the Department of Justice has been and still is representing Land and Sawyer, sued *as individual tortfeasors*, to defend them from personal liability, such as the threat of imprisonment made to Secretary Sawyer by the District of Columbia Court of Appeals in its contempt order. And public policy permits the Attorney General to do that without risking the property rights of the United States on the outcome.

Although the Dollars now profess to find great difference between "res judicata" and "collateral estoppel," they themselves called their defense in the present case "res judicata" (R. 66, 76-7, 192, 194, 258; Appellees' Brief, pp. 56-7).

That our distinguishing of *United States v. Candelaria*, 271 U.S. 432, in our original brief (p. 26-7) was sound is shown by appellees' quotation from that case (Brief, p. 26) that the United States would be concluded "if the decree was rendered in a suit *begun and prosecuted*" by Government counsel. *Dollar v. Land* certainly was not "begun and prosecuted" by the Department of Justice.

The Dollars rely heavily upon a student note in the Harvard Law Review (Vol. 65, No. 3) which accepts Judge Murphy's opinion at face value. Unfortunately, the student author apparently wrote that note without the benefit of this Court's opinion of November 20, 1951. *United States v. Dollar*, 193 F. 2d 114 (C.A. 9).

Those authorities cited by the Dollars which we have not already disposed of in our original brief are readily distinguishable.

Lovejoy v. Murray, 3 Wall. 1, 18; *Bruszewski v. United States*, 181 F. 2d 419 (C.A. 9); *United States v. Ring Const. Corp.*, 96 F. Supp. 762 (D. Minn.); *Chi-*

cago, Rock Island & Pacific Ry. Co. v. Schendel, 270 U.S. 611, all applied collateral estoppel against *private* litigants, so no question of sovereign immunity was involved.

Gunter v. Atlantic Coast Line Railroad Co., 200 U.S. 273, is specifically distinguished from *Dollar v. Land* by Mr. Justice Douglas in his concurring opinion in *Georgia R. Co. v. Redwine*, 342 U.S. 299, 307. *Richardson v. Fajardo Sugar Company*, 241 U.S. 44, merely held that the Treasurer of Porto Rico, having appeared in a suit, could not subsequently deny the court's jurisdiction *over him* (not the sovereign Porto Rico). In *Porto Rico v. Ramos*, 232 U.S. 627, the Government of Porto Rico was held bound where it had "voluntarily petitioned to be made a party, asserting rights to the property in question." The United States certainly did not petition to be made a party in *Dollar v. Land*. On the contrary, the District of Columbia Court of Appeals specifically held that the United States had *not* submitted itself to the court's jurisdiction. *Land v. Dollar*, 188 F. 2d 629, 632 (C.A. D.C.).

Contrary to appellees' assertion (Brief, p. 33), in *Minnesota v. United States*, 305 U.S. 382, 384, the Attorney General appeared not merely for the United States but also for "the other respondents" [Government officers], but the court nevertheless acquired no jurisdiction over the United States.

Whether the United States *could* have intervened in *Dollar v. Land* is beside the point. It did not do so, but rather chose to exercise its undoubted privilege to stand aloof from that action and instead try its title in the courts of this Circuit. That privilege even the District of Columbia Court of Appeals concedes. *Land v. Dollar*, 190 F. 2d 366, 375; *Sawyer v. Dollar*, 190 F. 2d 623, 645. *Dollar v. Land* is not, as was *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, a case

where the property was actually in the custody of a court in an in rem proceeding. On the contrary, *Dollar v. Land* was an in personam action against Land, et al. as individual tortfeasors, and the District of Columbia courts made no effort to take custody of the stock.

In *United States v. Guaranty Trust Co.*, 76 F. 2d 747 (C.A. 2) the United States voluntarily appeared in the state court; "there was no claim that the United States appeared specially in the proceeding." The same was true in *United States v. Jacobs*, 100 F. Supp. 189 (N.D. Ala.). In *United States v. Utah*, 283 U.S. 64, the United States was plaintiff; no question of estoppel was involved anyway.

The Thekla, 266 U.S. 328, rests entirely upon doctrines peculiar to admiralty law and has no bearing on the conclusiveness of other types of proceedings against the United States, as is explained fully in *United States v. Shaw*, 309 U.S. 495, 502-4.

American Propellor Co. v. United States, 300 U.S. 475, was a suit in the Court of Claims, where Congress has consented to suit against the United States. The court merely held that the Government had failed to prove a counterclaim it pleaded.

Finally, the cases cited in appellees' brief (pp. 52-3) as to "estoppel" against the United States merely held that where the United States brings suit, its cause of action in equity is to be tested by established equitable principles. None of those cases involved any question of waiver of sovereign immunity, whether by "collateral estoppel" or otherwise.

V.

Appellees' Arguments in Support of the Appropriateness of Summary Judgment Are Unsound.

Appellees argue (Brief, p. 64) that the District of Columbia record could not have presented substantial evidence in support of our position that the stock was transferred outright, for if it did, the Court of Appeals would not have felt free to reverse, in the light of the limitations of Rule 52(a), F.R.C.P. As we show in our original brief, however (pp. 38-9), the District of Columbia Court of Appeals felt itself free to disregard Rule 52(a) entirely. *Dollar v. Land*, 184 F. 2d 245, 248-9. We submit that the Court of Appeals was wrong in its interpretation of Rule 52(a), but whether right or wrong, that court's opinion directly negatives the Dollars' contention that the District of Columbia record did not contain substantial evidence to support a conclusion of outright transfer.

In answer to our contention that the courts of this circuit are free to exercise their own judgment on the issue as to whether the stock was transferred in pledge or outright, appellees cite *Leishman v. Radio Condenser Co.*, 167 F. 2d 890 (C.A. 9). But there this Court merely held that a district court *in this circuit* was not free to reach a conclusion contrary to that of this Court deciding the same issue in an earlier case. Of course, a district court is bound to accept without question the decisions of its own court of appeals, which was all that this Court held in the *Leishman* case. The question is entirely different where, as here, the courts of this circuit are asked to accept blindly the judgment of the District of Columbia Court of Appeals.

In *General Motors Corp. v. Leishman*, 85 F. Supp. 187 (S.D. Cal.), the district court recognized that an earlier decision by the Court of Appeals for the Tenth Circuit on the same issue "does not operate to control

us in this action'' and made an independent examination of the record and reached its own conclusion on the issue.

In *United States v. Weil*, 46 F. Supp. 323 (E.D. Ark.), the district court made its own examination of an issue which had been decided by the court of appeals of a different circuit and *refused* to follow the court of appeals decision.

Of the cases cited in appellee's brief at page 72, not one involved a verified pleading (such as the Government's complaint in the quiet title suit). Certainly the verified complaint has as much evidentiary value as Mr. Lasky's affidavit, which asserted what he could not possibly know to be true and which we have shown to be false (see our original brief, pp. 46-7).

The fact that the Solicitor General and other Government counsel have informed the courts that they are willing to have the Supreme Court pass on the merits of the pledge or outright transfer issue on the basis of the District of Columbia record does not by any means belie our showing here that we are prepared to make a new and better record on the trial of this action. We are so firmly convinced that the District of Columbia Court of Appeals committed manifest error in its conclusion that the stock had been merely pledged, that we are willing to place that issue before the Supreme Court on the District of Columbia record, incomplete as it is.

Foster v. General Motors Corporation, 191 F. 2d 907 (C.A. 7); and *Adkins v. E. I. Du Pont de Nemours & Co.*, 181 F. 2d 641 (C.A. 10), differed from the present case because there the complaint was unverified and, in any event, failed to state a cause of action.

Hemler v. Union Producing Co., 40 F. Supp. 824 (W.D. La.), can scarcely be accepted as good authority since the district court there rendered a summary judg-

ment on the same issue which the Supreme Court in *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, held should not have been decided on summary judgment.

Appellees' brief (pp. 80-7) contains a long analysis attempting to support the opinion of the District of Columbia Court of Appeals on the merits, with many references to the District of Columbia 2,000-page printed record. We do not believe that this Court will undertake an analysis of that 2,000-page record at this stage of the case, since Judge Murphy made no findings of which this Court might have the benefit. We do, however, here briefly reply to appellees' argument in order to demonstrate the manifest error of the District of Columbia Court of Appeals in its decision on the merits.

Appellees assert that that decision of the District of Columbia Court of Appeals rests on admitted facts. The contrary is the truth, for the opinion of the District of Columbia Court of Appeals is founded on its conclusion that the parties intended to transfer the stock in pledge. And, of course, we sharply deny the correctness of that conclusion.

We sharply disagree with the conclusions of the District of Columbia Court of Appeals that if this identical transaction had occurred between private parties "no court of equity would have treated the transfer of the shares as other than a pledge", and that "The equitable nature of the transaction was distinctly a pledge." 184 F. 2d 245, 253. The District of Columbia Court of Appeals reached this conclusion by wholly ignoring the decisive fact that the stock was transferred to the Commission as consideration for the release of R. Stanley Dollar and Dollar Steamship Line from their liabilities to the Government as sureties on the ship debts, as to which the operating line was the principal.

Of course, if the Maritime Commission had taken this stock from R. Stanley Dollar and Dollar Steamship Line and had *not* released *them* from their liability on the debt, equity might strain to construe the transaction as a pledge rather than an outright transfer. But for a creditor to accept consideration from a surety (whether in the form of money or property, as here) in exchange for releasing the surety entirely from his obligation, while leaving the principal liable on the debt, is a perfectly legitimate transaction, legally and equitably. *In re Kimbrough-Veasey Company*, 292 F. 757 (N.D. Ga.); *McIlhenny Co. v. Blum*, 68 Tex. 197, 4 S.W. 367; *Bridges v. Phillips*, 17 Tex. 128; *Gilstrap v. Smith*, 101 Ga. 120, 28 S.E. 608; *Peer v. Kean*, 14 Mich. 354; *Mechanics Bank v. Rathbone*, 26 Vt. 19; Brandt, *The Law of Suretyship and Guaranty* (1905 ed.), Sec. 172, p. 353; Pingrey, *Suretyship and Guaranty* (1901 ed.), Sec. 147, p. 107.

The District of Columbia Court of Appeals was likewise in error in its conclusion that a pledge of the stock was indicated by the fact that the Maritime Commission caused new certificates to be issued to the "United States Maritime Commission" rather than to the "United States" and that the Commission "continued to hold the certificates in its own possession without transfer to any recognized repository of property of the United States." 184 F 2d. at 254.

Since the Commission had all the general and implied powers of a private corporation (see pp. 13, 15, *supra*), there was no reason why it should not have had the stock certificates issued in its own name rather than in the name of the United States. The Maritime Commission was not organized as a Government corporation and was not a legal entity separate from the United States. 46 U.S.C. 1111; *United States v. Remond*, 330 U.S. 539. Any property interest the Commission ac-

quired would therefore necessarily be vested in the United States. It is, of course, not uncommon for Government officials and agencies to acquire property rights for the United States in the name of such officials or agencies. See the *Remund* case, *supra*; *In re Wilson*, 23 F. Supp. 236 (N.D. Tex.). The name used is of no legal significance; the substance of such transactions controls, and they inure to the benefit of the Government, not the official or agency. *Hodgson v. Dexter*, 1 Cr. 345, 363; *Remund* case, *supra*; *In re Wilson*, *supra*; *North Dakota-Montana Wheat Growers Ass'n. v. United States*, 66 F. 2d 573 (C.A. 8).²⁸

The District of Columbia Court of Appeals advanced no reason for its conclusion that the Commission was not a "recognized repository of property of the United States" insofar as this stock is concerned. Every Government agency is the custodian of property owned by the United States (e.g., supplies and furnishings). 46 U.S.C. 1112 plainly authorized the Commission to hold "property and interests of every kind, owned by the United States."

40 U.S.C. 301, cited by appellees (Brief, p. 86) has no relevance. That statute (first enacted in 1863) must be read as qualified by the Merchant Marine Act of 1936, which vested in the Commission the powers of a private corporation in carrying out the policies of that act (46 U.S.C. 1117). 46 U.S.C. 1116, which provides for a revolving fund in the Treasury, obviously relates only to money. Corporate stock cannot be put in a revolving fund and used for expenditures.

On the question as to whether credibility of witnesses is involved, appellees' statement (Brief, p. 89,

²⁸ See also *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536; *Inland Waterways Corp. v. Young*, 309 U.S. 517, 523-4; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 383; *United States v. Allied Oil Corp.*, 341 U.S. 1, 5.

footnote) that “no *fact* testified to by [Mr. Dollar] has ever been questioned,” is entirely erroneous. We certainly do question Mr. Dollar’s testimony that he did not know until 1945 that American President Lines had paid off its debt to the Government, and we have strong evidence to show the falsity of that testimony (Appellant’s original brief, p. 51). So credibility is involved.²⁹

CONCLUSION

The Dollars, having accepted the benefits of the Adjustment Agreement, will not now be heard to challenge the authority of the Maritime Commission to acquire title to the stock under the agreement. The Commission was, however, authorized to acquire such stock in the exercise of its broad powers to settle claims under section 207 of the Merchant Marine Act of 1936. In any event Congress has ratified the Commission’s action in acquiring title to the stock.

Respectfully submitted,

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DONALD B. MACGUINEAS

*Attorney, Department of
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March, 1952

²⁹ Appellees’ statement (Brief, pp. 92-3) that “it is a stipulated fact that appellees did not know until 1945 that the debt was paid (J.A. 390, 391),” is a flagrant misstatement of the record.

APPENDIX

CORRESPONDENCE BETWEEN THE MARITIME COMMISSION
AND MEMBERS OF CONGRESS REFERRING TO THE GOV-
ERNMENT'S ACQUISITION AND OWNERSHIP OF THE AMER-
ICAN PRESIDENT LINES STOCK

Exhibit 1

Sept. 17, 1938.

Hon. John Patrick Doherty
41 High Street
Charlestown, Mass.

Dear Mr. Doherty:

Reference is made to your letter of September 3, 1938, relative to calls of the Dollar Line vessels at Boston.

Referring to your statement that the Commission owns 90% of the stock of the Dollar Steamship Lines, Inc. Ltd., we wish to advise you that whereas an agreement was completed in August, providing contingently for the conveyance of certain voting stock to the Commission, such transfer has not been made pending the completion of various arrangements in accordance with the terms of the agreement.

Until such time as all arrangements are finally completed and in accord with the agreement it will be impossible for the Commission to advise you as to when callings may be resumed at Boston.

We sincerely appreciate your interest in the unemployment problem referred to and trust that when final arrangements are fully completed the condition may be rectified.

Sincerely yours,

(Sgd.) E. S. LAND

E. S. Land

Chairman

[Italics supplied]

Exhibit 2

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

August 13, 1940

Hon. Emory S. Land,
Chairman,
United States Maritime Commission,
Washington, D. C.

Dear Admiral:

Does the Maritime Commission still hold the stock which was acquired in the course of the Dollar Line sale and reorganization and has the Commission received any offers for the purchase of this stock from private sources? If you can supply any details, it will be deeply appreciated.

Sincerely,

/s/ EVERETT M. DIRKSEN
Everett M. Dirkson MC.

Exhibit 3

August 19, 1940

The Honorable
Everett M. Dirksen
House of Representatives
Washington, D. C.

American President Lines, Ltd.

Dear Mr. Dirksen:

I refer to your letter of August 13, 1940, relating to the Commission's stockholdings in American President Lines, Ltd. None of the shares held by the Commis-

sion have been disposed of, nor is the sale of the stock by the Commission in contemplation at the present time.

Sincerely yours,

/s/ E. S. LAND

E. S. Land

Chairman

Exhibit 4

UNITED STATES SENATE
COMMITTEE ON
EXPENDITURES IN THE EXECUTIVE
DEPARTMENTS

July 14, 1943

Hon. Emory S. Land, Chairman,
United States Maritime Commission,
Washington, D. C.

Dear Admiral Land:

The press recently carried an announcement that your Commission will offer, or has offered, for sale the stock of the American President Lines, now held by your Commission.

Presumably, the prospective purchasers have been furnished a prospectus of the properties and assets and liabilities of the Line.

I will appreciate your furnishing me promptly with a copy of such prospectus, and, if it is not included, the following data pertaining to the assets of the American President Lines:

(a) A detailed list of the vessels owned with the book value; the depreciated value and the estimated market value of each of the vessels; the cost of each such vessel to the American President

Lines; the date that each was built; and, if such were reconditioned when the work was done and the cost thereof. I would like the total amount of Government funds invested in each vessel, either through the provisions of the Acts of 1928 or 1936 or through loans or grants or other costs directly or indirectly absorbed either by the United States Shipping Board or the United States Maritime Commission. I would also like the value placed on each of these vessels when your Commission, in releasing the Dollar and other interests from their financial responsibilities took over the possession or control of the stock of this Company, which your Commission is now offering for sale.

(b) An itemized list of other major properties owned by this Line, and the assessed value, the appraised value, the depreciated value and the estimated market value thereof as of the most recent date when such values were placed. Also, the value placed on the Agency contract which this Line had with the War Shipping Administration; the gross and net income of the American President Lines for the years 1939, 1940, 1941, and 1942; the charter hire received by such line in each of the years 1940, 1941 and 1942, from moneys of the Maritime Commission, the War and Navy Departments or Lend-Lease Funds; and the net income for charter hire for each of the years referred to from moneys paid by the Agencies herein enumerated. Also, a detailed statement as to total Federal taxes paid in 1940, 1941 and 1942 by this Company. Also, the value of the reserve funds held by this Company, other than the amounts of such reserve funds due the Government, and the value, if any, of deposits or allowances due the Company as a result of payments made or allow-

ances made toward the purchase or construction of new vessels. Also, a statement of any amounts due this Company awaiting payment due to any differences now existing between the Commission and the Comptroller General as to the construction placed on or the interpretations of any section of the Merchant Marine Act of 1936, as amended.

(c) *The names of those persons or corporations who hold the stock of the American President Lines, not owned by any Agency of the United States Government; and the number and estimated value of such shares held by such persons or corporations. Also, a statement as to the value of such stock at the time the Maritime Commission took possession of the American President Lines, and whether or not the holders of these minority shares were responsible for financial obligations comparable to the financial obligations of the Dollar interests at the time your Commission released the Dollar interests from such financial responsibilities.*

(d) A list of the Executive Officials of the American President Lines, who, prior to their being placed on the payroll of the American President Lines, or any subsidiary thereof, were employed by, or held office in, any Governmental Agency; the salary now paid them, and the salary which they were paid in their former Governmental positions.

(e) The personnel of the Committee which your Commission has delegated to conduct these sales negotiations, and a descriptive background, the periods of employment with your Commission, or

its predecessor, the duties or responsibilities and the salaries paid to each.

I trust I may receive this information promptly.

Sincerely,

/s/ G. D. AIKEN

[Italics supplied]

Exhibit 5

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

WASHINGTON, D. C.

July 20, 1943

Admiral Emory S. Land
Maritime Commission
Washington, D. C.

My dear Admiral Land:

In view of the interest which I have taken in what, to me, appears to be an apparent misuse of government funds entrusted to your Commission, I have had some inquiries as to the terms or conditions of sale of the controlling 90% of the voting stock which your Commission is alleged to possess of the American President's Line.

I have been unable to ascertain whether or not any prospectus has been made public or any list of the assets and liabilities of this line, which through the sale of the stock your Commission holds, will pass from Government control to some private interest.

It is my understanding that a few years ago your Commission contemplated the sale of these properties to the owner of the controlling interest in the American Mail Line, one Mr. Reynolds. Further, I understand that at that time or previous to that time, Commissioners Moran and Wiley filed some strong dissent-

ing and opposing opinions as to the propriety of what action your Commission contemplated taking.

May I be informed as to when you plan to dispose of these securities and also may I have a list of the contemplated purchasers with whom you are negotiating and a statement from your Commission as to whether or not the public has been given an opportunity to bid on these properties. Will you please also furnish me with a list of the properties such as ships, wharves, etc., and whether or not the ships held by this line have been taken over by the Government or whether they are chartered by the Government and what is the net income per month from such charters, if they are chartered, accruing to the company.

Trusting I may be furnished with this information promptly, I remain

Yours sincerely,

/s/ ROBERT F. JONES
Robert F. Jones, M.C.

Exhibit 6

July 22, 1943

Honorable George D. Aiken
United States Senate
Washington 25, D. C.

Dear Senator Aiken:

I have your letter of July 14, 1943, in which you refer to a recent announcement carried in the press with respect to the American President Lines, and asking for certain information in connection therewith.

As you probably know, the American President Lines, Ltd., is the outgrowth of the Dollar Steamship Lines, Inc., Ltd., which at, or about the time of the

organization of the Maritime Commission under the Merchant Marine Act, 1936, was in serious financial difficulty, so that its services in the essential trans-pacific and around the world routes were virtually in the course of abandonment, and its ships were progressively being laid up because of inability of the Company to make current repairs.

It became necessary for the Commission, in order to carry out the purposes of the Merchant Marine Act, and in protection of the ship mortgage debt owed to it, to bring about a reorganization of the Company. Various creditors took securities in the form of debentures and preferred stock for a large part of the current debt owed by the Corporation, arrangements were made partially through the Reconstruction Finance Corporation and partly directly by the Commission, through loans secured by specific and general mortgages on the Company's vessels which permitted the rehabilitation of their fleet and the resumption of operations, and *a controlling interest (about 80%) of the common stock was taken over by the Commission.*

The management of the Company was entrusted to a Board of Directors which represented in part the old creditors and stockholders, and in part the interest of the Commission, and so far as possible, the Company has been independently managed by its Board of Directors, the Commission, however, assisting in selecting the top-side management.

Mr. Joseph F. Sheehan, who had been Executive Director of the Commission became President of the Corporation, and Mr. William G. McAdoo, who was never connected with the Commission, but who was, of course, well known to it, became Chairman of the Board of Directors. Both of these gentlemen died in office. The office of Chairman of the Board has not subsequently been filled. Mr. Henry F. Grady succeeded Mr. Shee-

han as President of the Company. Mr. Grady, as you probably know, was, prior to his selection as President of the American President Lines, Ltd., Assistant Secretary of State. The Company is presently operating under the executive direction of Dr. Grady.

The condition in which the Commission found the Company and the various corrective steps which were taken (during which the name of the Company was changed from Dollar Steamship Lines, Inc., Ltd., to American President Lines, Ltd., without changing the identity of the Corporation, but with various changes in its Certificate of Incorporation) are set forth in two booklets prepared by the Commission, one being entitled "Financial Readjustments in Dollar Steamship Lines, Inc., Ltd.", dated February 17, 1938, and the other, "Reorganization of American President Lines, Ltd.", dated April 10, 1939. These two booklets will give you, I think, comprehensively and in considerable detail much of the information which you have requested in your letter.

It is the policy of the Commission, as laid down for it by the Congress in the Merchant Marine Act, that so far as possible, the Merchant Marine shall be privately owned and operated. There have been indications recently that *it may be possible to bring about private ownership of the American President Lines at some time in the near future either through disposing of the stock of the Corporation or by some other means*, and it is with a view to determining whether or not such a step is practicable at this time that the announcement referred to in your letter was made by the Commission.

Since the announcement does not make any offer on the part of the Commission, no prospectus has been issued, but information for responsible parties who desire to formulate and present plans pursuant to the

Commission's announcement is available to such parties in the Commission's office and also in the office of the American President Lines in San Francisco. In this connection, I am enclosing for your information a memorandum which is given to any who make inquiry with respect to the availability of such information.

You ask with respect to the personnel of a Committee to which you understand that the Commission has delegated the conduct of negotiations. The only Committee that the Commission has appointed in this connection had assigned to it only the task of formulating for consideration by the Commission an advertisement for bids for the Commission's stock owned in the American President Lines. This Committee recommended an announcement of a somewhat more general character, the exact form of which as adopted by the Commission is shown by a copy thereof which I am also enclosing for your information.

I am enclosing also copies of the Annual Reports made by the Company to its stockholders for the fiscal years ended December 31, 1939, 1940, 1941, and 1942, respectively, which will give you, I think, fairly comprehensive information with respect to the operations of the Company subsequent to its reorganization.

I shall send you very shortly additional information along the lines of your request.

Sincerely yours,

/s/ E. S. LAND

E. S. Land

Chairman

[Italics supplied]

[ENCLOSURE TO ABOVE LETTER]

PR 1510

UNITED STATES MARITIME COMMISSION
WASHINGTON

July 6, 1943

IMMEDIATE RELEASE

The Maritime Commission announced today that it is giving consideration to the possibility of bringing about private ownership of the American President Lines.

The announcement said: "The Commission is giving consideration to the possibility of bringing about private ownership of the American President Lines at the appropriate time. Parties who desire to submit comprehensive and definite proposals with that end in view should place the same in the hands of the Commission not later than September 15, 1943."

This announcement is in answer to a number of inquiries received by the Commission as to its policy with respect to the ownership of the company.

The American President Lines company was formerly the Dollar Steamship Lines, Inc., Ltd., well known for its trans-Pacific and Around-the-World services operated by it for many years. As a result of serious financial difficulties the Company was reorganized in 1938, largely under the direction of the Maritime Commission which took measures to insure the continuation of the services in these essential trade routes.

In the reorganization the name of the Company was changed to "American President Lines, Inc.". Some of the debts of the Company were covered by debentures and preferred stock, and the Maritime Commission, to protect its interests and insure continuation of

service, came into possession of 80 per cent of the common stock. Although the Commission had full voting control, it caused the Company to be operated by a Board of Directors which included representative local interests of San Francisco and former creditors of the concern.

In connection with the reorganization the Company incurred heavy indebtedness for working capital purposes and to put its fleet of vessels into proper operating condition. This indebtedness has since been paid off.

Dr. Henry F. Grady of San Francisco, former Assistant Secretary of State, and former Dean of the College of Commerce of the University of California, is President of the American President Lines.

Exhibit 7

July 31, 1943

The Honorable
Robert F. Jones
House of Representatives

My dear Mr. Jones:

I have your letter of July 20, 1943, in which you refer to a recent announcement carried in the press with respect to the American President Lines, and asking for certain information in connection therewith.

As you probably know, the American President Lines, Ltd., is the outgrowth of the Dollar Steamship Lines, Inc., Ltd., which at, or about the time of the organization of the Maritime Commission under the Merchant Marine Act, 1936, was in serious financial difficulty, so that its services in the essential trans-pacific and around the world routes were virtually in the course of abandonment, and its ships were pro-

gressively being laid up because of inability of the Company to make current repairs.

It became necessary for the Commission, in order to carry out the purposes of the Merchant Marine Act, and in protection of the ship mortgage debt owed to it, to bring about a reorganization of the Company. Various creditors took securities in the form of debentures and preferred stock for a large part of the current debt owed by the Corporation, arrangements were made partially through the Reconstruction Finance Corporation and partly directly by the Commission, through loans secured by specific and general mortgages on the Company's vessels which permitted the rehabilitation of their fleet and the resumption of operations, and a controlling interest (about 80%) of the common stock was taken over by the Commission.

The management of the Company was entrusted to a Board of Directors which represented in part the old creditors and stockholders, and in part the interest of the Commission, and so far as possible, the Company has been independently managed by its Board of Directors, the Commission, however, assisting in selecting the top-side management.

Mr. Joseph F. Sheehan, who had been Executive Director of the Commission became President of the Corporation, and Mr. William G. McAdoo, who was never connected with the Commission, but who was, of course, well known to it, became Chairman of the Board of Directors. Both of these gentlemen died in office. The office of Chairman of the Board has not subsequently been filled. Mr. Henry F. Grady succeeded Mr. Sheehan as President of the Company. Mr. Grady, as you probably know, was, prior to his selection as President of the American President Lines, Ltd., Assistant Secretary of State. The Company is presently operating under the executive direction of Dr. Grady.

It is the policy of the Commission, as laid down for it by the Congress in the Merchant Marine Act, that so far as possible, the Merchant Marine shall be privately owned and operated. There have been indications recently that *it may be possible to bring about private ownership of the American President Lines at some time in the near future either through disposing of the stock of the Corporation or by some other means*, and it is with a view to determining whether or not such a step is practicable at this time that the announcement referred to in your letter was made by the Commission.

Since the announcement does not make any offer on the part of the Commission, no prospectus has been issued, but information for responsible parties who desire to formulate and present plans pursuant to the Commission's announcement is available to such parties in the Commission's office and also in the office of the American President Lines in San Francisco. In this connection, I am enclosing for your information a memorandum which is given to any who make inquiry with respect to the availability of such information.

An announcement by the Commission, dated July 6, 1943, the exact form of which as adopted by the Commission is shown by a copy thereof which I am enclosing for your information. Pending receipt of any plans as per the announcement, no negotiations are being conducted.

The American President Lines, Ltd., as at December 31, 1942, were in possession of the following lists of properties:

Ships	Rate of bareboat charter
PRESIDENT BUCHANAN	\$1,045.33 per day
PRESIDENT FILLMORE	1,045.33 per day
PRESIDENT GRANT	1,120.35 per day
PRESIDENT TYLER	1,045.33 per day
PRESIDENT MONROE	1,039.97 per day
PRESIDENT POLK	1,039.96 per day
PRESIDENT JOHNSON	1,208.27 per day

These ships were assigned to the War Shipping Administration under bareboat form of charter.

Wharves, etc:

The Lines had at Hunt's Point, New York, unimproved real estate, the book value of which was shown at \$1,002,480.25. The property at Shanghai, China, consisted of a wharf and warehouse which are now in the hands of the enemy, the Japanese Empire, no value being shown on the books of the Lines as of this date.

Sincerely yours,

/s/ E. S. LAND

E. S. Land

Chairman

[Italics supplied]

Exhibit 8

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

October 28, 1943

Rear Admiral Emory S. Land,
Chairman,
U. S. Maritime Commission,
Washington, D. C.

Dear Admiral Land:

The press has recently carried the announcement to the effect that the Maritime Commission has rejected all offers for the sale by the Commission of the capital stock of the American-President Lines, Inc., to private interests. I should be interested in having a look at the list of those submitting bids and the amounts bid with conditions, if any, attached to such bids. I should appreciate it if you would arrange to supply me with this information.

Sincerely yours,

/s/ R. B. WIGGLESWORTH

Exhibit 9

January 31, 1945

Honorable Cecil R. King
House of Representatives
Washington, D. C.

Dear Congressman King:

In the absence of Admiral Land I am replying to your letter of January 29, 1945 with respect to the matter of the American President Lines.

In the summer of 1943, the Commission announced that it would give consideration to the possibility of bringing about private ownership of the American President Lines at an appropriate time, and invited interested parties to submit plans for its consideration with that end in view.

Data with respect to the Company was brought together for use by interested parties and is still available, having subsequently been appropriately augmented.

There is enclosed herewith a copy of the memorandum which advised those who made inquiry as to how they might have access to the available data, and if your constituents who are interested in the matter wish to have access to the data, either in Washington or San Francisco, they may make arrangements in accordance with this memorandum.

The reference to "September 15th" in the last paragraph of the memorandum, of course, refers to the previous announcement and may, therefore, be disregarded.

Very truly yours,

Signed: R. E. ANDERSON

R. E. Anderson

Director of Finance

Enclosure

Exhibit 10

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

May 21, 1945

Admiral Emory S. Land, Chairman
United States Maritime Commission
Washington, D. C.

Dear Admiral Land:

The May 3, 1945 issue of "Maritime Activity Reports" contains an article reading as follows:

"As an initial move in clearing the decks for charting the post-war American merchant marine, the Maritime Commission was last week disclosed surveying the situation covering the American President Lines, Ltd.

The American President Lines succeeded to the shipping franchises formerly held by the Dollar Steamship Lines *with the Commission still owning about seventy-five percent of the common stock of the company and voting something like 90 percent of all classes of stock.*

In laying out post-war essential trade routes, the commission's staff had been confronted with the knotty problem of allocating ships to *a steamship company in which the Government owns the controlling stock* serving routes on which privately owned lines operate or could operate vessels.

Furthermore, the American President Lines has before the Commission a proposed post-war operating plan calling for a fleet of thirty passenger cargo ships over four shipping routes. To carry out the proposed operations the line asked permission to charter four of the commission's P-2

design, 610-foot displacement ton combination passenger and cargo vessels, and twelve cargo ships, either the 522-foot, 14,600 deadweight ton C-4 design or the 492 foot, 12,000 deadweight ton C-3 design and to buy ten vessels of the C-3 type. With four remaining vessels of its pre-war fleet, the line would then have a fleet of thirty ships.

Prior to the war the APL maintained passenger and cargo service over two routes, the trans-Pacific and round-the-world. The line's post-war plan proposes two new routes, from United States Atlantic Coast ports via the Panama Canal to the Philippines, Hong Kong, and the Straits Settlements, and from the United States Pacific Coast ports and Hawaii to the Philippines, Dutch East Indies, Straits Settlements and India.

Operations of the APL were extremely successful and the commission had no difficulty in obtaining offers from a syndicate to purchase *the Government-owned stock in the company* but it rejected the proposals. As of June 30, 1944, the company had \$2,095,291 in its capital reserve fund and \$8,571,732 in its special reserve fund from operating subsidy payments. In addition the company has received settlements from losses of several ships, notably the PRESIDENT COOLIDGE on which the settlement amounted to \$7,000,000.

The APL poses the question to the commission as to *whether it should dispose of the Government-owned stock in the company or lay the whole problem of the liquidation of the Government ownership before Congress for determination*. The commission's decision on which course to take is imminent."

I should appreciate being informed as to the status of this matter whether the Commission has asked or

received bids or offers to buy *the stock owned by the Government* and if so, what action has been taken or is contemplated.

I understand that the Commission has been operating this *Government-owned line* and, in effect, in competition with privately owned lines at the same time that the line has received Government subsidies. Is the Commission, in your judgment, free to dispose of this line without further authority from the Congress?

I shall be glad if you will keep me posted as to developments.

Sincerely yours,

Signed: R. WIGGLESWORTH
[Italics supplied]

Exhibit 11

May 26, 1945

Honorable Richard B. Wigglesworth
House of Representatives
Washington, D. C.

Dear Congressman Wigglesworth:

You have inquired by your letter of May 21, 1945, with respect to the matter of the American President Lines, Ltd. The Commission's stockholding in this Company, as I think you know, resulted from steps taken in 1938 and 1939, looking toward the rehabilitation of the trans-pacific and around-the-world steamship services operated by Dollar Steamship Lines, Inc., Ltd., which was then in financial difficulty. The details of the reorganization of the Company, the name of which was changed to American President Lines, Ltd. are contained in a report which I had the honor to make to the Congress of the United States under date of April 10, 1939, entitled "Reorganization of American President Lines, Ltd." Earlier steps are outlined in another volume entitled "Financial Read-

justments in Dollar Steamship Lines Inc., Ltd.," published by the Government Printing Office, 1938.

In the summer of 1943, at which time the Company had substantially rid itself of the indebtedness funded at the time of the reorganization and was in healthy financial condition, the Commission invited proposals with a view to bringing about full private ownership of the Line. Such proposals as were submitted however, as a result of this invitation, were in the opinion of the Commission either insufficient as an offering for the stock held by the Commission, or were not such as to give reasonable assurance for adequately serving the commercial needs of the American commerce on the routes covered.

The policy of the Merchant Marine Act as set forth in Section 101 thereof contemplates that our Merchant Marine shall, insofar as may be practicable, be privately owned and operated. It is believed that the Commission has ample statutory authority to carry out this policy in the case of the American President Lines, Ltd., whenever it finds it practicable to take steps to that end.

The Company is not operating in competition with other private steamship lines, as all such operations on the high seas under the United States flag are being carried out on an agency basis through the War Shipping Administration as part of the international shipping pool. With a view to avoiding such operation post-war, consideration is being given to the issuance of another invitation for proposals. If such an invitation is issued, I shall be glad to advise you thereof as you have requested.

Sincerely yours,

Signed: E. S. LAND

E. S. Land

Chairman

Exhibit 12

January 31, 1946

Honorable Emanuel Celler
House of Representatives
Washington, D. C.

Dear Congressman Celler:

In accordance with the request from your office, I am sending you herewith copy of Admiral Land's affidavit in the pending litigation with respect to American President Lines. You will find in this Affidavit, beginning at the bottom of page 2, a condensed history covering the reorganization of the Dollar Lines (now American President Lines), the steps taken by the Commission to bring about private ownership of the stock held by it, and something of the background of the present litigation.

Very truly yours,

(Signed) R. E. ANDERSON

R. E. Anderson

Director of Finance

Exhibit 13

UNITED STATES SENATE
COMMITTEE ON
EXPENDITURES IN THE EXECUTIVE
DEPARTMENTS

August 2, 1948

Vice Admiral William W. Smith
Chairman
United States Maritime Commission
Commerce Building
Washington, D. C.

Dear Admiral Smith:

It is my understanding, from our conversation this morning, that the by-laws of the American President Lines require the annual election of the president of the corporation, so that it is not possible to give Mr. Killion such a three or five-year contract as has been suggested.

I am also assuming that what you told me constitutes an assurance on your part that there will be no move by the *Maritime Commission, representing the Government as sole stockholder*, to amend the by-laws so as to permit the making of a long-term contract with Mr. Killion without notifying the Senate Committee on Expenditures in the Executive Departments.

Sincerely yours,

/s/ G. D. AIKEN
Chairman

[Italics supplied]

Exhibit 14

Washington 25, D. C.

June 22, 1949

Honorable Warren G. Magnuson
United States Senate

Dear Senator Magnuson:

You have requested Maritime Commission comment with reference to recent allegations on the Senate floor by Senator McCarran to the general effect that the Maritime Commission took over a steamship line "merely as a pledge, and declared it to be its property". The Senator's statement obviously referred to stock of Dollar Steamship Lines, Inc., Ltd. (now American President Lines, Ltd.) and a transaction which took place in 1938. The allegation that the Commission took over the line "as a pledge" is directly controverted by a recent decision of the United States District Court for the District of Columbia, as is the inference that the stock is not the property of the United States.

While the Maritime Commission is naturally hesitant in commenting upon this matter in view of the fact that it is now pending before the judicial branch of the government, attached hereto is a copy of the pertinent opinion (reported 82 Fed. Supp. 919) by Judge McGuire of the District Court of the United States for the District of Columbia dated December 2, 1948. Plaintiffs have appealed from Judge McGuire's decision to the United States Court of Appeals for the District of Columbia. Without attempting to restate this able opinion, we call attention to the following significant facts which the judge incorporated therein after lengthy trial upon a voluminous record:

Plaintiffs delivered their stock endorsed in blank to the Maritime Commission representing the United

States in 1938. Approximately five years later plaintiffs demanded that the stock be returned, claiming that it had been pledged and not transferred outright. The Commission through the Department of Justice denied that the shares were pledged, and alleged the ownership of the stock by the United States. Plaintiffs further claimed that the Commission was unauthorized by the Merchant Marine Act of 1936 or any law to take title to the stock. Judge McGuire held that the stock had been transferred outright and that the transaction was a legal one.

Pointing out among other things that plaintiffs were men of large interests and great business experience acting with the assistance of able counsel, had failed in 1938 to consummate an arrangement with the Commission which contemplated pledge of the stock, that after the deal was made and long before suit was entered Stanley Dollar referred to himself as a "former owner" of the stock and that Dollar and other plaintiffs in their 1938 tax returns treated the transaction as the surrender and transfer of all right, title and interest in stocks of Dollar Steamship Lines, Inc., Ltd., listed therein and that the Dollar interest were insistent that the Dollar name, flag, and insignia be not used by the Company after the stock-transfer, Judge McGuire held that the transfer was an outright transfer of title and in a word, that the Government owns the stock. He further pointed out that when the transfer occurred the line was at the end of its resources, and that there was serious question as to whether or not the stock then had any value, "on the one side was disaster complete and irretrievable, which meant undoubtedly not only the end of Dollar of Delaware but in all probability, if not the end then certainly damage of an irreparable character to Dollar of California and its affiliates, and to the financial stability of the per-

sonal plaintiffs. On the other, there was still hope of saving something. They decided to jettison what they could, to save themselves and Dollar of California and its associated enterprises''.

The Commission submits as wholly sound the position which it took in 1937 and 1938; that only by reorganizing the steamship line and acquiring its stock for the United States could the vital American Flag service involved be preserved with proper protection for the government interest therein. The Commission kept Congress currently advised of this transaction; the history of which is embodied in two detailed and fully documented printed reports to Congress, one (Financial Readjustments in Dollar Steamship Lines, Inc., Ltd.) made February 17, 1938 and the other (Reorganization of American President Lines, Ltd.) made April 10, 1939.

It has long been known that the Maritime Commission believes in private rather than government ownership of steamship lines, and it has always been (as it is) the intention of the Commission (unless, of course, prevented by judicial restraint as we have been) to dispose of this stock to private American interests when in the opinion of the Commission such action will be advantageous to the Government and will promote the purposes and policy of the United States, declared in the Merchant Marine Act of 1936.

The Commission trusts that this letter contains the information which you desire and will be glad to supplement it in any way that you may deem appropriate.

Sincerely yours,

/s/ PHILIP B. FLEMING

Philip B. Fleming

Chairman

Exhibit 15

UNITED STATES SENATE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE

June 22, 1949

Philip B. Fleming
Major General
Chairman
United States Maritime Commission
Washington, D. C.

Dear General Fleming:

I am very glad to have copy of your letter to Senator Magnuson regarding the Dollar Steamship Lines. We trust we can persuade Senator McCarran to allow the Merchant Marine Act to pass without undue delay.

Cordially yours

/s/ OWEN BREWSTER
Owen Brewster, U.S.S.

OB:dr

No. 13,130

IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP
LINE, a Corporation; THE ROBERT DOLLAR
Co., a Corporation; H. M. LORBER,

Appellees.

Appellees' Supplemental Memorandum

HERMAN PHLEGER

GREGORY A. HARRISON

MOSES LASKY

BROBECK, PHLEGER & HARRISON

111 Sutter Street

San Francisco 4, California

*Attorneys for Appellees R. Stanley
Dollar, Dollar Steamship Line,
The Robert Dollar Co., and
H. M. Lorber.*

FILED

APR - 3 1952

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

PAUL P. O'BRIEN
CLERK

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United States
Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP
LINE, a Corporation; THE ROBERT DOLLAR
Co., a Corporation; H. M. LORBER,

Appellees.

Appellees' Supplemental Memorandum

I.

**APPELLANT IS BOUND BY THE DISTRICT OF COLUMBIA
JUDGMENT ON PRINCIPLES OF COLLATERAL ESTOPPEL**

After this brief was in page proof we found that the current issue of *Harvard Law Review* (March 1952) contains a major article on "Developments in the Law—Res Judicata" (pages 818 to 887). At this last moment it is not possible to quote. But the article fully supports our brief on the subject, and expressly approves the judgment below as correct (p. 856). (This article is in addition to the one in the January issue of the *Harvard Law Review* referred to in our brief.)*

Appellant relies upon the statement in the Supreme Court's opinion in *Land v. Dollar* (referred to in later decisions and opinions) that in a subsequent suit brought by the United States

*See also *Georgetown Law Journal*, January 1952, page 289, "At the Crossroads of the Doctrine of Sovereign Immunity: The Dollar Case."

the judgment in the first suit would not be *res judicata*. But that statement by the Supreme Court has no application because it was not made with reference to any later and different set of facts to which the decision and opinion were not directed.

Thus appellant implicitly concedes and certainly will not deny that the Department of Justice could have intervened in *Dollar v. Land* in behalf of the United States *eo nomine* after the Supreme Court's decision, and pleaded the title of the United States and, that if it had done so, a judgment adverse to it would have been binding in any later suit under the doctrine of *res judicata*. That being so, it necessarily follows that no such statement by the Supreme Court in its opinion could have any application to later activities in behalf of the United States which justify application of the principle of collateral estoppel. On an intervention the United States would be bound, not only by what was decided, but by everything that could have been. *A fortiori*, it is bound by facts constituting a collateral estoppel, which has the lesser effect of binding one only by what is decided.

It must follow that (a) an appeal to the doctrine of sovereign immunity is sham, and (b) an appeal to what the Supreme Court said in 1947 is equally unavailing.*

Appellant's discussion contains this remarkable statement (R. Br. 48):

"The issue of ownership of the shares is still pending before the Supreme Court on our petition for reconsideration of denial of certiorari to review *Dollar v. Land* on the merits."

The petition for certiorari and the petitions for rehearing referred to in this passage were filed in *Dollar v. Land* by the Depart-

*Appellant's reply brief (p. 49) tries to confuse the difference between *res judicata* and collateral estoppel by asserting that appellees themselves called the defense *res judicata*. It would, of course, be irrelevant what appellees' counsel may have called it. However, the assertion is unfounded. Appellant's citations to the record show that, after pleading the facts, our answer characterized the facts in two ways (1) as creating a conclusiveness of the judgment and (b) as creating *res judicata*. We presented the subject of *res judicata* in our brief in a footnote (at p. 45) but have not thought it necessary to amplify the point "because the collateral estoppel is clear, and it is sufficient."

ment of Justice nominally on behalf of the defendants Land, et al. But appellant says "our." What more striking confession could be asked that *Dollar v. Land* has been conducted by the Department of Justice for the United States as the real party in interest to assert the title of the United States? Unless counsel rivet their minds by sheer will power on artificialities, they naturally fall into a recognition of the reality.

Appellant apparently makes the statement just quoted to suggest that the judgment in the District of Columbia litigation is not final. It is final. In the federal courts it is settled that even an appeal from a judgment "does not—until and unless reversed—detract from its decisiveness and finality." *Huron Corporation v. Lincoln County*, 312 U.S. 183 at 189. So long as a judgment is unreversed, its integrity, validity and effect are complete as to all those affected, "in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense." *Deposit Bank v. Frankfort*, 191 U.S. 499 at 511; *Reed v. Allen*, 286 U.S. 191.

A petition for certiorari has even less consequence than an appeal. Neither its filing nor the granting of a writ has any effect. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163; *Robertson & Kirkham*, Jurisdiction of the Supreme Court of the United States, 1951 ed., at p. 886. Here a petition for certiorari has been denied, a petition for rehearing was then denied, and what is presently pending is merely a second petition for rehearing of denial of certiorari.

II.

NO GENUINE ISSUE OF FACT EXISTS, THE UNDISPUTED AND ADMITTED FACTS ESTABLISH THAT THE 1938 TRANSFERS WERE A PLEDGE, AND THEREFORE A SUMMARY JUDGMENT WAS PROPERLY ENTERED FOR APPELLEES.

1. Re Appellant's Failure to Make Any Showing in Opposition to the Motion for Judgment.

At the oral argument before this Court on March 24, 1952, appellant's counsel gave his reason for tendering in the District Court no showing of new evidence in opposition to the motion

for summary judgment. The reason was that appellant *had no such evidence*, because its "investigation was just beginning at the time the case came before Judge Murphy on summary judgment" (Transcript, p. 23).

This is a remarkable revelation!

When appellant filed this suit on March 12, 1951, it rushed into court for a preliminary injunction to prevent appellees from enforcing their judgment for possession obtained in the District of Columbia courts. In seeking that injunction *appellant represented* to the District Court that it already had new evidence. On March 26, 1951, its counsel, the very counsel who addressed this Court on March 24, 1952, said in open court (R. 70):

"And furthermore this case will be tried on a new level. Counsel for the Dollars has asserted that all of the facts have been put into evidence in the District of Columbia proceedings. Nothing new could be presented. It would be merely a rehash of the same old thing. That, Your Honor, is not the case. Either party on the trial of this action will be free to adduce such new evidence as it chooses, and *I assert to Your Honor right now the Government has new evidence not presented in the District of Columbia action which it will present upon the trial of this case.*"

When the District Court issued its preliminary injunction in April 1951, it was motivated, at least in part, by this representation. Its opinion states (97 F. Supp. 50 at 55): "In addition, they [appellant] claim that additional evidence is to be presented."

On May 31, 1951, the cause was before this Court on motion for stay of the preliminary injunction pending appeal therefrom. At the time the same counsel asserted that the government "will be free to and it *will* make a new record on the merits of the case." (Transcript of proceedings of May 31, 1951, p. 20). It was on the very next day that the motion for summary judgment came on in the District Court.

Yet, as counsel has now assured this Court, at that time appellant knew of no new or material evidence.

Here is a case where the material facts occurred in 1938. The complaint in *Dollar v. Land* was filed in November 1945. It was not until 1948 that the case went to trial. The Court of Appeals for the District of Columbia decided the case on its merits in July 1950. At least as early as December 1950 counsel began to think of filing the present suit (R. 93). Three months more elapsed before it was filed. Another two months elapsed before the motion for summary judgment was heard. Four more elapsed before it was decided.

Yet now we are told that appellant had only begun to look for new evidence at the time the motion for judgment was heard.

This confession that no new relevant evidence was available when the motion for judgment was presented completely confirms our assertion that none exists, because every shred of evidence had been sifted in the preparation for the first trial.

And in what "secluded" nooks was the "new" evidence hidden which appellant now goes outside of the record to assert that it has? The material referred to in its Opening Brief (pp. 49-52) was in the newspaper files it ransacked for the first trial, in the probate file it examined and photostated for the first trial, in the files of the Bureau of Internal Revenue it explored for the first trial, in reports of the Commission with which the record in the first trial is replete.

If appellant were seeking a new trial on the ground of newly discovered evidence, it would be laughed out of court for lack of diligence and for lack of materiality of the trivia it proffers. *United States v. Pacific Fruit & Produce Co.*, 138 F.2d 367, 371 (9 Cir.); *United States v. Bransen*, 142 F.2d 232, 235 (9 Cir.); *Lanham v. Cline*, 132 F.2d 320 (3 Cir.); *Pasotex Pipe Line Co. v. Murray*, 168 F.2d 661, 663 (5 Cir.). A new trial on this trivia "would merely have resulted in giving [it] another day in court." *Mutual Life Ins. Co. v. Parkinson*, 72 F.2d 759, 761 (3 Cir.).

Moreover, it is completely irrelevant that appellant did not have any "new evidence" available at the time of the motion for summary judgment. Rule 56(f) R.C.P. provides the procedure

for a litigant who can obtain evidence if given time but does not yet have it. Under it appellant could have applied to the court below, on a proper showing by affidavit, for (1) an extension of time in which to make a showing or even (2) for an order refusing the application for judgment.

Appellant made no such application, let alone a showing to support it. Had it made such an application the facts would not even have warranted its being granted. *Hartman v. Time, Inc.*, 64 F. Supp. 671, 677; *Shultz v. Manufacturer's & Traders Trust Co.*, 30 F. Supp. 443.

After all, appellant was not a defendant, haled into court and rushed to a hearing. It was the plaintiff. It had filed the suit at a time chosen by itself and grievously tied up appellees with a preliminary injunction.

But we need not consider what disposition would have been proper of an application under Rule 56(f), if one had been made. None was. It would be the height of incongruity if an appellant could obtain a reversal upon a bare assertion to the appellate court that it was not ready in the court below.

It was asserted at the oral argument that this is not a proper sort of case for a summary judgment because, forsooth, eventually some new shred of evidence might be uncovered. If a private litigant were to make such a representation to a court, we submit the assertion would receive not a moment's consideration. The fact that the government is the appellant should make no difference.

If the government can demand postponement of a motion for summary judgment while it searches for new evidence, it could equally postpone a trial for the same reason.

We submit that appellant's contention is not only unsound, it is disgraceful.

The truth is apparent:—Appellant never has intended to do anything and never has done anything with respect to the motion for summary judgment except to insist that, unlike a private litigant, it has an absolute right to a trial *de novo*, just for the asking.

2. **Re Appellant's Failure to Point to Any Error in the Decision of the Court of Appeals for the District of Columbia.**

Another truth is apparent from appellant's briefs and oral argument: It does not point to any error in the decision of the Court of Appeals for the District of Columbia; it simply insists that the District Court should have disregarded that Court's decision, just as if it never existed.

Beyond this, appellant merely charges the District of Columbia Court of Appeals with "ignoring the * * * fact that the stock was transferred to the Commission as consideration for the release of R. Stanley Dollar and Dollar Steamship Line from their liabilities to the Government as sureties on the ship debts." (R. Br. 54).

Of course, that court ignored nothing. Transfer of the property in consideration of a release of a surety liability does not mean a sale. It means a substitution of collateral. As the Court of Appeals succinctly said (*Dollar v. Land*, 184 F.2d 245 at 256):

"In ordinary commercial transactions full consideration for release from a suretyship is paid by the surety in either of two ways, (1) satisfaction of part of the debt or (2) other collateral acceptable to the creditor is supplied. * * * Where the debt continues intact and the creditor releases a surety upon deposit of a paper security, the creditor does not by that transaction alone become absolute owner of the security thus deposited. He holds it as pledgee."

Appellant asserts (R. Br. 55) that a creditor can take ownership of property in exchange for releasing a surety while leaving the principal liable on the debt. Assuming that such a transaction is legally *possible*, the observation is irrelevant, and for *three* distinct reasons:

First, equity frowns on such a transaction. If a particular agreement is unequivocally of the nature described, a different question may be presented. If the agreement is not unequivocally such, it will not be so construed. In the District of Columbia litigation the burden of proof was upon the Dollars. Yet the Court held that equity and the record compelled a construction

contrary to what appellant claims. Here the burden of proof is upon appellant, and the record is the same. Appellant points to nothing but the face of the written agreement. Yet the Supreme Court held that the face of the agreement does not lead to appellant's conclusion. The agreement was before the Supreme Court in *Land v. Dollar*, 330 U.S. 731, and the Department of Justice there unsuccessfully argued that the transaction was necessarily a sale.

Second, Appellant's assertion confuses two different questions: (a) whether a discharge of a surety will completely discharge the principal, and (b) whether the value of what is paid by the surety for his discharge must at least be applied to reduce the debt of the other. The leading cases, while holding that there is no discharge *in toto*, also hold that the debt is reduced *pro tanto*. *New Orleans v. Gaines*, 138 U.S. 595, 601, 602, 615, 616; and see 131 U.S. at 220. And *Barnett v. Conklin*, 268 Fed. 177 (8 Cir.).*

In the *Gaines* case, the City of New Orleans had purchased land and sold portions to many others. Gaines claimed that she or her ancestors and not the city's vendor was the owner and prevailed in her claim. She sued the city's vendees for rents and profits accruing while they were in possession and recovered judgments totalling \$576,707.92. She then sued the city for this amount. Upon the basis of a rule of the civil law derived from the Code Napoleon which prevails in Louisiana, the court held that the city was the principal and its vendees sureties, and that Gaines could therefore hold the city liable (see 138 U.S. at 600, quoting from previous decision in 131 U.S. at 191, and see 131 U.S. at pp. 210, 213). But the court held that if any of the judgments had been compromised for less, the city was entitled to the benefit of the reduction (138 U.S. at 601, 131 U.S. at 220). On retrial it was shown that Gaines had released some of the vendees for amounts totaling \$15,394.50 (138 U.S. at 602), but reserved her rights against the city. The city claimed that the

*Appellant cited these cases in its District of Columbia briefs but omits them now.

releases discharged it in full; Gaines claimed that no credit should be given the city at all. The trial court rejected both claims and gave judgment for \$561,313.42, thus deducting the \$15,394.50 (138 U.S. at 605). Both sides appealed, and the Supreme Court rejected both appeals and affirmed (pp. 615, 616).

In appellant's first citation, *In Re Kimbrough-Veasey Co.*, 292 Fed. 757 (N.D. Ga.), the court held that while a mere agreement not to sue one co-debtor does not discharge the others, nevertheless "by the weight of authority, however, since the creditor is entitled to but one satisfaction, no matter how many persons may be bound to render it to him, any payment so made must be credited as against the other co-obligors" (p. 758).

In California, the Civil Code recognizes the distinction. A release of one co-debtor does not discharge the other (Section 1543) but it does diminish his obligation by the amount of what is paid (Sections 1474 and 1477. Also California Annotations to Restatement of Contracts, Sec. 120).

Third, appellant ignores the relationship of the parties here. Mr. Dollar and Dollar of California were not merely sureties for Dollar of Delaware. All three were "jointly and severally liable" on the debt (See Our Brief, p. 81; J.A. 310-319, particularly 312 and 317). As respects each other they were sureties, but as respects the creditor, the United States, the situation was that Dollar of California and Mr. Dollar were jointly and severally principals with Dollar of Delaware.*

*The facts, it will be recalled, were that Mr. Dollar and Dollar of California were originally the debtors to the United States, the makers of the notes and the ship mortgagors. Later they transferred their interest in the ships to Dollar of Delaware. This required the Shipping Board's consent, which was given only upon agreements that Dollar of Delaware become liable on the notes and that Mr. Dollar and Dollar of California remain liable as makers and mortgagors. The agreements specified that all three were "jointly and severally" liable to the United States. It is an elementary principle of law that on a sale of mortgaged property by the mortgagor wherein the purchaser agrees to assume the debt, as between themselves the purchaser becomes in law the principal debtor and the mortgagor occupies the relation of surety. But as regards the creditor, the original mortgagor remains bound as a principal. *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531; *Bank of America v. Dennison*, 8 C.A.2d 173, 47 P.2d 296.

The *Restatement of the Law of Contracts*, Section 120, sums up the law on the subject: If one of two or more obligors pays in whole or in part, in the manner provided in his contract, the payment redounds to the credit of all the other obligors, whether the liability is joint, joint and several, or merely several; *and no agreement to the contrary will be given effect*. If, instead of performing in the manner provided in the contract, one obligor either fully or partially satisfies the obligation (as by transferring property in whole or partial satisfaction of an obligation to pay money) again the right of the creditor to proceed against the other obligors is reduced by the value of what was transferred, and if the obligation is joint, or joint and several, *no agreement to the contrary is effective*. Such an agreement may be regarded if the liability was merely several, but even then the law will avoid the result if in any way possible. See, particularly, Comment c on subsection (2) (referring to the idea of unity in a joint duty) and to the Comment on subsection (3).

2 *Williston on Contracts* (Rev. Ed. 1936, Sec. 341, pp. 1008-1011) discusses the subjects and supports the view of a *pro tanto* discharge of all joint or joint and several debtors even though there be an express agreement to the contrary. He adds (p. 1011):

"Payments so made are now applied in reduction of the debt and in discharge of the other promisors or obligors by statute in a number of jurisdictions,"

citing Section 1474 of the California Civil Code and Section 3 of the Uniform Joint Obligations Act. This rule that, if one joint debtor is released on a transfer of ownership of property, its value must be applied to reduce the debt of the other applies to debts due the United States. *United States v. Thompson*, Fed. Cas. No. 16,487 (E.D. Penn., 1836).

In short, there may be several situations in which a surety relationship arises. Those occupying the relationship between themselves may be jointly and severally obligated as to the creditor

or they may be only severally obligated.* As said in the Restatement of the Law of Security, Section 82, page 230:

"So far as the creditor is concerned, the surety may be the primary obligor. Where principal and surety are bound jointly, from the standpoint of the creditor there is no secondary liability."

And, again (232):

"Suretyship obligations are contractual, and the important point of inquiry should be the precise undertaking of the surety and the duty of the principal. The recognition of the existence of different forms of contractual suretyship and the emphasis upon the obligation assumed in a particular case, are of greater significance than the distribution of labels to the various types of contracts."

As the Restatement further notes (p. 233): "None of these situations belongs solely to the field of suretyship," and they are included in that category only because such of the rules as arise from the surety relationship would apply to all. But the surety aspect cannot displace other rules arising from other aspects of the situation.

The authorities that lay down the rule covering cases of joint and several liability make no exception in case of suretyship. In 2 *Williston on Contracts*, Sec. 333, pp. 968-69 (Rev. Ed. 1936) it is said that the rule relating to release of one joint debtor does not depend on the law of suretyship, and that the cases disclose "no inquiry or consideration of possible suretyship relations which the joint debtor released may have borne to his co-debtors."

Even if it were legally possible for a co-debtor (or surety) to buy his release without necessarily reducing the debt of the others, the fact that the debt is not reduced is compelling proof of a

*A surety may be liable by himself, on a different obligation from that of the principal (e.g., to pay if the principal does not or to pay damages for the principal's default on some other obligation than one for the payment of money (see Restatement, Sec. 82, Comment f, p. 230)), or he may be jointly or jointly and severally liable with the principal on the same obligation, as here.

security transaction. Here the debtors were jointly and severally liable, and not merely severally so. Yet even in the case of debtors merely severally liable, where it is legally *possible* for one to buy his release without affecting the liability of the other, the law regards the result as so inequitable and unjust that it will avoid it if in any way possible. Referring to this situation, *Restatement on Contracts*, Sec. 120, comment on subsection (3) states:

“Though this is legally possible, an inference should not be drawn that the duty of one promisor only is to be affected, unless circumstances clearly require that conclusion” (p. 140).

The same spirit of antipathy to an unjust result compels the construction of the transaction as one where the property was not transferred outright but was merely substituted as security in place of the co-debtors' personal liability.*

*It is interesting to note what was actually involved in the handful of cases diligently exhumed by appellant from musty volumes.

Peer v. Kean, 14 Mich. 354 (1866) involved the liability of the maker of a note (the principal) upon discharge of an endorser, whose liability was several, not joint. *Mechanic's Bank v. Rathbone*, 26 Vt. 19 (1852) involved the liability of the acceptor of a draft (the principal) upon the release of the drawer, whose liability was merely secondary and several. *Bridges v. Phillips*, 17 Tex. 128 (1856) involved sureties on a note, and the question as to whether release of the surety discharged the principal entirely, not whether credit should be given. *In Re Kimbrough-Veasey Co.*, 292 Fed. 757 (N.D. Ga.) the relationship was not that of joint debtors but was the conventional one of principal and surety in its very inception. The court, sitting in Georgia, applied Georgia law, relying on *Gilstrap v. Smith*, 101 Ga. 120, 28 S.E. 608, another of appellant's citations, which was based on Georgia Civil Code (1895), Sec. 2970 (now Georgia Code of 1933, Sections 103-201).

Pingrey on Suretyship and Guaranty (published 1901) and *Brandt on the Law of Suretyship and Guaranty* (published 1905) deal with the conventional suretyship, and the cases cited by these two texts support us.

ON LACK OF AUTHORITY IN THE COMMISSION

A. Re the Contention That Appellant Is Entitled to Prevail Even Though the Commission Lacked Power to Acquire Absolute Title.

Appellant tries to avoid confronting the issue of the Commission's power to take ownership by arguing that appellant may prevail even though the Commission lacked that power. This argument is not only unsound on the merits but it has been foreclosed by the Supreme Court.

1. THE CONTENTION HAS BEEN FORECLOSED BY THE SUPREME COURT.

The argument is in the teeth of the Supreme Court's decision on this very matter, as well as the decision of the Court of Appeals for the District of Columbia Circuit. Both of those courts explicitly held that appellees are entitled to the stock in *either* of two events: (a) If the Commission had no power to acquire absolute title; or (b) if, properly construed, the contract was a pledge. And in either event, the Supreme Court said, the "dominant interest of the sovereign is then on the side of the victim," i.e., the present appellees (330 U.S. 731, 738).

The Supreme Court held in *Land v. Dollar*, 330 U.S. 731, 735:

"The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondent's property under the claim that it belongs to the United States. That conclusion would follow if either of respondent's contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares."

And again at page 739:

"* * * if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they [plaintiffs] are entitled to possession of the shares as against [defendants] * * *."

The Court of Appeals said in *Dollar v. Land*, 154 F.2d 307:

"Appellants contend that the 1938 contract represented nothing more than a pledge of the stock. This position is founded on two arguments: (1) the Commission was without authority to acquire absolute and unqualified title to the securities, and (2) the terms of the contract, and the circumstances under which it was entered into, require the court to interpret it as a security transaction. The debt originally owing the Commission has now been paid. Hence, if appellants' contention be correct the United States now has no interest in the collateral. * * * (p. 309)

"* * * if * * * the defendants acted without authority in the first instance, or have by subsequent conduct overreached their statutory authority, their position becomes the same as that of the officials of the Lee case. (fn. 6, p. 310)

In its opinion of April 11, 1951, *Land v. Dollar*, 190 F.2d 366, the Court of Appeals said (p. 367):

"This is the fourth time this case has been before us. It has been before the Supreme Court three times. The first time, that Court, without dissent, rendered an opinion which has been the guide for every subsequent action of this court."

The opinion then quotes the foregoing passage from the Supreme Court's opinion.

Appellant asserts that the question whether appellees may assert the Commission's lack of authority has not been passed on in the District of Columbia litigation! This is an incomprehensible assertion. On the contrary, the issue was *necessarily implicit* in the jurisdictional issue and was necessarily decided.

The gist of the contention is that, despite lack of power to take ownership, ownership passed because the transaction was "executed" or because lack of power can be asserted only by the United States, and the like. But none of these arguments depend on any affirmative showing by appellant or by defendants in *Dollar v. Land*. They constitute a response of "so what" to the charge that the Commission lacked power—a demurrer. Were that demurrer sound, the decision of the Supreme Court would have been erroneous.

Moreover, the contention was *explicitly* made by the Department of Justice in the District of Columbia litigation and was argued in the briefs.* Indeed appellant's entire argument on the subject has been scissored out of its brief on the appeal culminating in *Dollar v. Land*, 184 F.2d 245. Part III of that brief (pp. 93-94) was entitled "Appellants are not entitled to recover the stock even if the Commission lacked authority to acquire absolute title."

The issue was presented and necessarily decided by the Supreme Court, not only because the jurisdictional issue rested upon it, but independently. The court reversed a dismissal of the complaint. The dismissal would have had to be affirmed if sustainable upon any ground whatever. In seeking an affirmance, the Department of Justice invoked that rule and argued, not only that the suit was one against the United States, but that the complaint stated no cause of action.

Consequently, the argument appellant makes is foreclosed.

2. THERE IS EVEN LESS SUBSTANCE FOR THE CONTENTION NOW THAN IN THE DISTRICT OF COLUMBIA.

Since the contention had no substance in the District of Columbia, it has less substance here.

There the Dollars were the plaintiffs, seeking recovery. Here the Attorney General, speaking as the United States, is the plaintiff, seeking affirmative relief to quiet a title. A plaintiff is under the burden of establishing its title, and that it can not do on the basis of a transaction having no authority in the statutes.

3. THE ARGUMENT IS UNSOUND ON ITS MERITS.

Acquisitions of property by government agents without authority of statute are not merely unauthorized, they are prohibited (see our brief, p. 100). The problem is not one of application

*E.g., the Department's brief in the Court of Appeals on the first appeal in 1946 (at pp. 45 and 46), our brief at p. 25, and our brief in the Supreme Court, pp. 26 and 27. Also briefs in the trial court in 1948; Department's brief, pp. 17, 33-39.

of the rules of principal and agent existing between private individuals, or of *ultra vires* in the field of private corporations, but of Congressional grant of power to a government agency. "The law applicable to the authority of a Government employee is quite different to the law applicable to an agent or employee of a private individual or company." *Bayboro Marine Ways Co. v. United States*, 72 F. Supp. 728, 730.

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power and adequate Congressional authorization to the contracting officers, warranted by the Constitution and regular under statute. *United States v. Allegheny County*, 322 U.S. 174, 182. Lack of validity or lack of power cannot be waived. *Parkersburg v. Brown*, 106 U.S. 487, 501. Lack of power results in nullity. Nullity passes no ownership. If the transaction when it occurred did not transfer ownership, government officials cannot set up ownership in the government, and the owner is entitled to recover. This is precisely what was held in *United States v. Lee*, 106 U.S. 196, 199.

In *United States v. Tichenor*, 12 Fed. 415, the United States claimed that defendants had quitclaimed certain land to it. The court said (p. 421):

"Neither did these conveyances * * * have the effect to vest any interest in the premises in the plaintiff. * * * there was no authority upon the part of the grantee to purchase, and therefore they were as conveyances void and inoperative. * * * It is not claimed that there was any law authorizing any one to purchase this property, and without such authority, the purchase was void."

In *City of Floydada v. American La France & Foamite Industries*, 87 F.2d 820 (5 Cir.), appellee sold and delivered a fire truck to the City of Floydada, which was without the power to purchase it under the state constitution. The sale was therefore held to be void. "The title to the fire truck never passed to the City, but remained in the would-be vendor." (p. 821).

In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, the court said (p. 689):

"* * * where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief."

Appellant (R. Br. 4) cites cases to the proposition that "limitations on the authority of a Government agency are for the benefit of the Government, not for the benefit of those, such as the Dollars, who voluntarily contract with the agency." The cited cases do not relate to acts done beyond any granted power but to the irregular exercise of unquestioned power and particularly to authorized acts performed merely without compliance with particular conditions or formalities construed as being for the protection of the government, such as public advertisements before the purchase of supplies or reduction of an authorized contract into a particular written form.*

Moreover, it is sheer question begging to assert that the transaction has been "executed" as an outright transfer of ownership. Since no power was ever conferred on the Commission to acquire the stock in private corporations *except as security*, any contract having the purpose or effect of transferring title would be ineffective, void and incapable of conferring or divesting rights, *to the extent* of a transfer by way of purchase, but it would be effective

*While the rules regarding the powers of government agents are far stricter than those respecting corporate powers, note *Louisville etc. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552 at 570:

"The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

Accord: *Fairbanks, Morse & Co. v. Highland Glades Drainage Dist.*, 43 F.2d 867.

to transfer title to the extent legally permissible. A pledge is also a transfer of title (Our Brief, p. 84, fn. 1), and a contract purporting to transfer title to any extent would serve to transfer it to the extent permitted, i.e., as security. The law in effect at the time an agreement is executed enters into and is a part of the contract. *Northern Pacific Ry. v. Wall*, 241 U.S. 87; *Von Hoffman v. City of Quincy*, 71 U.S. 535; *City of Floydada v. American La France & Foamite Industries*, 87 F.2d 820 (5 Cir.). In the case last cited, a purchase being beyond the City's power, a transfer of possession was treated as a contract for hire. In *Smoot v. United States*, 38 Ct. Cl. 418, a lease for a term of years to the United States where the government agent was authorized to lease for a lesser period was held valid as a lease for the permissible term.

In *Dollar v. Land*, 154 F.2d 307 the Court of Appeals for the District of Columbia held that if the Maritime Commission lacked statutory power to acquire ownership, all that it got was a pledge.

Moreover, in order to assert that a *sale* was executed, what was done—the acts of consummation as distinguished from the preceding agreement—must be compatible *only* with a sale. If equally consistent with a transaction of another character, it cannot be said that what was executed was a sale.

Here appellees neither gave nor received anything not equally consistent with a pledge. What they did—subsequent to the agreement—was to endorse and deliver stock. *This* was their *execution*, but it is thoroughly consistent with a pledge.

The same is true from the standpoint of what they received. Mr. Dollar and Dollar of California received a paper purporting to be a release. But the paper was nothing unless capable of being given effect as a discharge. A government official has no authority to release rights of the government without specific grant of power, and the government is not bound by his action in purporting to do so; such a release is void and unenforceable. *American Sales Corp. v. United States*, 32 F.2d 141 (5 Cir.); *Bayboro Marine Ways Co. v. United States*, 72 F. Supp. 728.

The releases here would be valid only as part of a substitution of collateral authorized under the 1938 amendment to Section 207 of the Merchant Marine Act. Since the Commission had no power to enter into the transaction as a purchase and sale, the releases as consideration for a purchase would be a nullity.

Still again, the stock was not transferred to the name of the "United States" but to the "United States Maritime Commission." If the Commission acted beyond its powers, then no transfer to the United States ever occurred, i.e., there was no execution as a sale. As said in *The Underwriter*, 6 F.2d 937, 939, 940 (aff. *Maul v. United States*, 274 U.S. 501):

"* * * But an agent of the government is such only within the prescribed limits of his commission, and his commission cannot exceed the boundaries of the legislative grant which authorized its issuance to him. When, therefore, an agent of the government acts in excess of the authority vested in him, his act from a legal standpoint is no longer the act of the government."

Appellant bases an argument on the subject of executed *ultra vires* contracts of private corporations. Not only is that subject foreign to the matter of powers of government officials, but the basis of the decisions cited* is the principle that no party in *pari delicto* may obtain relief from an executed illegal contract. And the *pari delicto* rule has no application to a case such as the present. The invalidity of taking outright title arose, not from any violation by appellees of public policy or from any engagement by them in fraudulent transactions, but from lack of statutory power in the Commission. No moral blame attaches to them. They were not in *pari delicto*. This very point was made by Chief Justice Taft, when he was a circuit judge, in *City of Detroit v. Detroit City Ry. Co.*, 60 Fed. 161 at 163, 164, holding the *St. Louis* case inapplicable. We call particular attention to pages 163 and 164 of that opinion.

**Harriman v. Northern Securities Co.*, 197 U.S. 244, at 295, 296, and *St. Louis etc. Railroad v. Terre Haute etc. Railroad Company*, 145 U.S. 393, at 406-408.

And in *Parkersburg v. Brown*, 106 U.S. 487, 503, the court said:

"* * * There was no illegality in the mere putting of the property by the O'Briens [the mortgagors] in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender * * *."

And see *Central Transp. Co. v. Pullman's Car Co.*, 139 U.S. 24 at 59 and 60. Also *Marsh v. Fulton County*, 77 U.S. 676, 684; *Citizens National Bank v. Appleton*, 216 U.S. 196, 205.

The victim of a transaction or an acquiescent party to the improper act of the other party is not considered to be in *pari delicto*. 12 *Am. Jur.* 734, 735*

Sometimes the principle of appellant's *ultra vires* cases is rested on estoppel. But in *Central Transp. Co. v. Pullman's Palace Car Co.*, supra, the court said (pp. 59, 60):

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say * * * beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. * * * No performance on either side can give the unlawful contract any validity * * *."

*Cf. *Kentucky Natural Gas Corp. v. Indiana, etc. Corp.*, 118 F.2d 831, 834 (7 Cir.); *Hartford-Empire Co. v. Glenshaw Glass Co.*, 47 F. Supp. 711.

As said in *First Federal Savings & Loan Assn. v. Ansell*, 68 Oh. App. 369, 41 N.E.2d 420, at 423:

"It is known that situations arise from which agreements ensue, where one party sits in the driver's seat, and the other by force of necessity must, to attain an authorized goal, comply with the request of the first party or abandon his opportunity. In such cases the end sought to be attained is a legal one, but in order to reach that station, he is by a mild but effective compulsion required to participate in an act, which by force of public policy is declared to be illegal. In such a case it is obvious that the parties do not contract on equal terms. Desperate necessity motivates the compliance of the one, while power and greed may dominate the other. Can it be said in such situations that each are in equal fault? Our answer is no."

And cf. *Morrison v. Landers*, 56 C.A.2d 607, 133 Pac.2d 34.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites * * * to its action because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."*

Patently, there is no basis for an estoppel. Appellant says that it lent money and gave a subsidy to the steamship line. But it has been repaid all loans. And the Commission's power to grant subsidies was to be exercised in the national interest of promoting an American merchant marine. The factors upon which a decision to grant a subsidy is to be made are stated in 46 U.S.C., Sec. 1171(a) and have no connection with acquisition of ownership. If the subsidy has served the statutory purpose of promoting the merchant marine, the United States has been the gainer, and if that purpose has not been served, ownership or lack of it has no bearing on the result.†

The argument made in appellant's reply brief at pages 2-3 is precisely the kind demolished in *Land v. Dollar*, 190 F.2d 366 at 375-6.

*To the same effect: *Granzow v. Village of Lyons*, 89 F.2d 83, 85 (7 Cir.); *City of Arcata v. Green*, 156 Cal. 759, 106 Pac. 86; *School Dist. No. 8 v. Twin Falls Mut. Fire Ins. Co.*, 30 Ida. 400, 164 Pac. 1174; *Pearson v. Duncan & Son*, 198 Ala. 25, 73 So. 406.

And in *Peoples Bank v. Eccles*, 161 F.2d 636, 82 App. D.C. 126, the Court has said that no rule of estoppel applies "where the litigant charges that the administrative body has exceeded the authority conferred on it by statute but does not attack the validity of the statute" (p. 644).

†Appellant asserts that the subsidy came to \$20,000,000. This is simply untrue. A five year subsidy contract was given. No subsidies were ever paid on some ships; subsidies were terminated on all by March 1942 (J.A. 1403). By virtue of a recapture clause, very little paid was retainable (J.A. 2057). Subsidies given after this litigation started in 1945 are not conceivably relevant.

B. Re the Contention That Authority of the Commission Has Been Ratified by Congress.

Appellant spends 14 pages (pp. 34-48) quoting self-serving statements made by the Commission to Congressional committees or individual congressmen. In the appendix it even has a 21-page collection of alleged correspondence with individual Congressmen.*

Passing by the fact that many of these statements suggest no more than acquisition of control† and that many were made after

*We are not told by what right government counsel lay such correspondence before the Court. They are no part of the record and could never have been made part of it. A court could not even take cognizance of them in interpreting legislation.

†The 1938 annual report of the Commission to Congress was the first formal announcement of the transactions involved in this controversy. It was made pursuant to the duty of the Commission under the Merchant Marine Act (46 U.S.C., Sec. 1118) to make a report to Congress of its activities at the beginning of each regular session. Far from supporting appellant, it does the reverse. At pages 30-32 there is a section entitled "Government Owned Lines." Here the Commission discusses government-owned steamship properties, but it does not refer to Dollar of Delaware either under that name or the name of American President Lines. That omission contrasts with the fact that on page 10 there is a special section devoted to the transaction in controversy under the heading "American President Lines, Ltd. (formerly Dollar Steamship Lines Inc., Ltd.)." In this section it is not reported that the United States or the Commission had obtained "title" or "ownership" to stock but merely that the "Commission acquired about 90 per cent of the outstanding common stock of the Dollar Line * * *" and that "This Adjustment Plan was consummated in October 1938 and the Commission as majority stockholder obtained complete control in the selection of the management." *Thus the emphasis was upon the fact that the Commission had obtained control of management*, a demonstration that this was its dominant motive and purpose and confirmation of the fact that the transfers were a security transaction. In *Dollar v. Land*, 154 F.2d 307, 310, a similar emphasis in a press release of the Commission is referred to as tending "to illustrate the genuineness of the claim which appellants [the Dollars] are asserting," and to confirm the claim that the 1938 transaction was nothing more than a bargain "by which there was a substitution of collateral resulting in strengthening the Commission's position by reason of the management control inextricably bound to the transferred stock."

Appellant next refers to the Special Report to Congress of April 10, 1939. This was designed as a paean of self-praise. If the transaction had consisted of a transfer of ownership to the United States, it concededly would have been an *extraordinary* one (cf. p. 108 of that report). It

the litigation began in 1945, they are pointless. It is fantastic to argue that a government agency creates its own power by not concealing from Congress its unauthorized conduct.

Appellant does *not* assert that Congress ever passed *any* Act ratifying the Commission's claim of power, expressly or impliedly. Power cannot arise from silence of Congress. An Act of Congress may give validity to an agency regulation so as to make it thereafter enforceable. But (1) there must be an Act, an affirmative action by Congress, as the legislative branch (not talk of individual Congressmen), and (2) the Act "must plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo*, 323 U.S. 283, 303. And Congress could not retroactively destroy a right of a citizen to recover property. *Forbes Boat Line v. Board of Commissioners*, 258 U.S. 338.

Here Congress has done nothing. Authority cannot be derived from nothing, much less retroactively.

C. Reply to Appellant's Discussion of the Commission's Power.

In this section, we shall not discuss arguments that we anticipated in our brief.

By failure to deny, appellant admits (1) that it is incumbent on it to point to statutory power; (2) that the power and authority must be clear; (3) that what is not granted is prohibited; (4) that there was no express grant of the alleged power to the Commission; (5) that unless it can be spelled out of Section 207 of the Merchant Marine Act, it does not exist; (6) that no government agency can claim a power by implication

would therefore be supposed that the Commission would openly inform Congress that the United States had become owner and not bury the fact in a mass of verbiage and documents. *It did not do so.* On page vii appears the letter of transmittal addressed "To the Congress of the United States" and signed by Admiral Land as Chairman. Nowhere in this transmittal is there any reference to "title" or passing of "ownership," only to the granting of a subsidy and the making of loans. The emphasis is upon the "*financial stake*" of the government in the company, all of which denoted a security transaction.

Appellant quotes from documents quoted in the body of this ponderous tome, but they were internal documents, pure and simple.

unless it is *necessarily* inferred from the statute in a way so clearly expressed as to amount to an express power.

It seeks to imply the power in four ways.

1. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP OF THE STOCK CAN BE IMPLIED FROM THE POWER TO PROTECT, PRESERVE OR IMPROVE COLLATERAL (R. Br. 7-10).

Reason simply will not sustain an assertion that the power conferred by the 1938 amendment to Section 207 to "protect, preserve or improve the collateral held by the Commission to secure indebtedness", here the mortgaged ships, gave the power to take outright title to the stock.

The Court of Appeals in *Dollar v. Land*, 184 F.2d 245 at 256, succinctly destroyed appellant's argument:

"While it is perfectly true that the Commission could, and should, make all proper and desirable requirements for the protection of Government loans, *its power stops at the line which separates the lender from the acquirer*. It could validly come into ownership of stock in the course of foreclosing collateral in the collection of a debt, but it could not acquire outright ownership in the guise of lending money and creating a debt."*

The stock would carry control of the management, and control by the Commission would secure the debt, but *security remains security, it remains attached to the debt, and when the debt is paid its function has been served*. So far as management or financial position of the company were concerned, the only difference between acquisition of the stock ownership and acquisition of the stock as collateral is that in the former case the Commission could acquire a windfall despite payment of the debt. And this difference is one having no relation to any legitimate objective of the Commission and no relation whatever to protecting, preserving or improving collateral. The power to take outright ownership cannot be inferred from the power to preserve, protect or improve collateral at all, much less "necessarily" so.

*For the rest of the quotation, see our brief, p. 99.

More than once appellant asserts that the Maritime Commission sought to acquire title in order to prevent the owners of the stock from sharing in possible improved common stock equities, and that such was its purpose and object (e.g., R. Br. 8, 9, 15). Indeed, this seems to be the basis on which appellant predicates the alleged power to take ownership. It is a confession that utterly destroys the claim of authority. It is a confession that the Commission simply decided to exercise its control over subsidies and the like to deprive stockholders of their equity for reasons having no relation to the functions and purposes for which the Commission was created. Congress did not confer on the Commission the power to determine the point at which risk capital should be confiscated or to decide that owners should be denied the right to profit in the event of success of their company.*

*The spuriousness of the alleged basis of power to take over ownership appears if we refer to a report entitled "Economic Survey of the American Merchant Marine" (J.A. 706, 1420). This was submitted to Congress by the Commission January 3, 1938 pursuant to the command of Sections 210 and 212 of the Merchant Marine Act of 1936 (46 U.S.C. Secs. 1120 and 1122). The Commission reported, under the heading, "Shipping as an Investment," that one of the weaknesses of the American merchant marine, which seemed unlikely to be remedied in the near future, was the hesitancy of private capital. Some of the deterrents to investment were fear of strikes (J.A. 1420)

"the lack of confidence in a stable Government subsidy policy and the fear that at some future time subsidy contracts may be canceled, leaving the operators without adequate redress; * * * The investment of private capital is also discouraged by provisions of the Merchant Marine Act of 1936 * * *.

"* * * the principal obstacle to capital financing is the political vulnerability of subsidized profits. * * * The moment a subsidized ship line creates substantial cash reserves and, perhaps, begins to pay dividends, there arises a demand for a reduction in the amount of aid. The general public does not know that the cyclical nature of the shipping industry requires large cash reserves; * * * The investor cannot be blamed for hesitating to put his money into an industry which, if profitable, is constantly subject to public and congressional condemnation on the grounds of excessive subsidy."

Every one of the factors referred to applied with particular vigor to Dollar of Delaware, many of them the handiwork of the Commission itself. Despite these discouragements, the stockholders and creditors did put up \$4,000,000, but this amount was consumed in the losses incurred

To predicate power on a purpose to expropriate the equity holders is a complete answer to the contention that the Commission was preserving, protecting, or improving collateral.

Appellant asserts that the transfer of stock of a corporation as consideration for a loan is familiar procedure. But its citations do not justify a contention that it is normal or customary for shareholders of a corporation to give up their stock to a lender of funds to the corporations whereby it not only becomes the creditor but the owner of the debtor as well.*

Appellant also goes far afield in citing cases involving the rule in judicial reorganizations that common stockholders may not retain an interest if the creditors or senior security holders accept less than what is fully due them. But, here, the stockholders, by retaining ownership of their stock, did not come ahead of the Commission in any degree, since their stock was pledged to it.

in the 13 months elapsing from cancellation of the mail contracts as of June 1937 until the agreement of August 1938, as a result of operating the line without any aid such as Congress had provided for in the Merchant Marine Act.

If the failure of old stockholders to put up still further money furnished reason and authority to confiscate their equity in the company, then the Merchant Marine Act authorized the Commission to seize ownership of the entire American Merchant Marine, for new capital was wary of the industry in 1937 and 1938. It is of such flimsy stuff that appellant's arguments are manufactured.

*In *French v. Shoemaker*, 14 Wall. 314, there was a dispute over the ownership of certain properties. In settlement the parties agreed to a transfer to a new corporation and the issuance to the disputants of its stock in certain proportions, and French agreed, for a loan to himself, to transfer his new stock to another party. But the transfer was not outright; *it was merely as security*. The plaintiff (the transferor) offered to reconvey on repayment of the money (14 Wall. 320), and the prayer of the complaint was that the court order foreclosure and sell the security to pay the loan (320, 321).

Handley v. Stutz, 139 U.S. 417, merely involved the power of a corporation to authorize and issue additional capital stock and to sell it. There certain shares of stock and certain bonds were sold together as a unit for fair value. There is no resemblance between that case and the situation claimed here, to wit, that in consideration for a loan to a corporation its stockholders gave to the lender *their* stock and thus gave it ownership of the corporation.

The power to "protect, preserve or improve collateral" was first added to the Merchant Marine Act of 1936 by amendment to Section 207, on June 23, 1938. On the same day Congress enacted Section 215 (46 U.S.C. Sec. 1125) which authorized the Commission in certain circumstances to acquire ships by purchase or otherwise. It also then amended Section 202 (46 U.S.C. Sec. 1112) to give the Commission the power to extend and renew notes. Section 215 and the amendments to Sections 207 and 202 are to be read together. Each had for its purpose the enlargement of the Commission's authority in respect to the performance of specific duties and the exercise of specific powers.

Prior to June 23, 1938 the Commission was without authority to acquire ships. *A fortiori*, it had no power to acquire them indirectly by acquiring the stock of a steamship line. Prior to that date even its power to acquire stock as collateral was questioned. What the Commission then obtained was (a) the authority to acquire ships but not corporate stock; (b) the authority to extend indebtedness, and (c) the power to protect and preserve collateral. *Expressio unius est exclusio alterius*.

In 18 *Decisions of the Comptroller General* 262, the Comptroller General held that Section 207, as amended to confer the power to protect, preserve or improve collateral

"evidently was not deemed by the Congress as sufficiently broad to vest in the Commission a general power to purchase vessels, even for its own account.

"Had such been the purpose of the amendment it would have been unnecessary and frivolous for the Congress to add just below the entirely new section 215 * * *."

It is equally frivolous to assert that the amendment to Section 207 was sufficiently broad to vest in the Commission the power to acquire a steamship company.

On the contrary, the 1938 amendment, in conferring the power to make disbursements and contracts "to protect, preserve or improve the collateral held by the Commission to secure indebtedness" is overwhelming proof that the Act did not, either there-

tofore or thereafter, confer the greater power to acquire outright ownership of property. Of course, the power to "protect, preserve or improve collateral" does carry the power to foreclose on the collateral, and in any such foreclosure sale to bid it in if there are no other bidders willing to bid a sufficient amount to pay the debt. This is but exercise of the powers conferred by the mortgage contract.

But here the security prior to the transaction of August 1938 was ships, not stock. And there was no attempt to sell the security (the ships) on foreclosure.

Appellant (R. Br. 10) argues that the trial court in *Dollar v. Land* held that acquisition of outright title was authorized by the Commission's power to protect and preserve the collateral. The Court of Appeals made short shrift of that wholly untenable argument (see passage quoted at p. 24, *supra*, and see our brief, p. 99).*

Appellant (R. Br. 13) refers to a report of a House Committee on the 1938 amendment to Section 207, in which it is said that the amendment was designed to make clear a power which it was thought already existed but about which some doubt has been expressed. The power already thought to exist was the power to take security and spend money to preserve security, e.g., to protect ships under mortgage from deterioration. The House Report stated:

*The trial court in *Dollar v. Land* apparently believed that if the Commission could buy in the mortgaged ships on foreclosure, it could acquire any property any time in any transaction. A power to buy in mortgaged property at a foreclosure in event of default cannot imply power to buy any property at any time and whether it has been mortgaged or not. A foreclosure sale is public, others may bid, the foreclosure and sale must be conducted according to statutory provisions, and the mortgagor is protected by various principles of equity and by rules against stifling of bidding. Foreclosure and sale of ships would be controlled by Section 250, Ship Mortgage Act, 46 U.S.C. Sec. 951. If other bidders offer enough to discharge the debt, a mortgagee could not draw power to buy out of power to protect its collateral, for a purchase would then be alien to protection. Moreover, proceeds of a foreclosure sale are used to discharge the debt which the foreclosed security protects. Here the \$7,500,000 debt secured by the ships was not reduced one penny.

"Section 3. This amends Section 207 of the Merchant Marine Act, 1936. * * * The specific reference to the power of protecting and preserving the collateral mortgages, and so forth, held by the Commission is intended to make certain that the Commission possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies, such as the Reconstruction Finance Corporation. Without such authority, the Commission may find it impossible to protect its mortgage or other interest in vessels, and title to which is in a transitory state, or where vessels are operated by the companies which are financially embarrassed when such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation."

The Hearings before the Committee on Commerce and the Committee on Education and Labor, United States Senate, 75th Congress, Third Session, on S. 3078 (the same bill), February 16 and 17, 1938, at pages 1157 and 1158, show the scope and purpose of the amendment to Section 207 beyond any question.* Mr. Kennedy, Chairman of the Commission, and Mr. Truitt, then its General Counsel, testified that their purpose was to have the power to spend money to protect the ships on which they had mortgages. There was no suggestion of taking title without a mortgage foreclosure, and none to acquiring ownership of a steamship company.

2. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP CAN BE DERIVED FROM ANY SUPPOSED POWER OF THE OLD SHIPPING BOARD OR FROM ITS FREEDOM FROM CONTROL OF THE GENERAL ACCOUNTING OFFICE (R. Br. 10-15).

We answered this in our brief, pp. 115-119.

*One of the Judges of the District of Columbia Court of Appeals, the Honorable Bennett C. Clark, was at the time a Senator, a member of the Committee, and was present at the hearings.

3. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP CAN BE PREDICATED ON ALLEGED POSSESSION BY THE COMMISSION OF THE POWERS OF A PRIVATE CORPORATION (R. Br. 15-21).

In our brief (pp. 110, 111) we answered this argument.

Appellant's reply brief (p. 15) refers to *Standard Oil Co. of California v. United States*, 59 F. Supp. 100.* That was a libel in admiralty for damages to cargo shipped on a vessel owned and operated by the United States through the W.S.A. The right to bring the suit was expressly provided by the Suits in Admiralty Act (46 U.S.C. Secs. 741-52). On the merits, one of the issues was whether the Administrator had the power, in executing a charter party, to create liabilities against the United States for all provable damages, including attorney's fees. The power to execute the charter did not depend on extracting from Section 207 of the Merchant Marine Act the power to do whatever a private corporation can do. Section 704 of the Act (46 U.S.C. Sec. 1194) provided in express terms that "all vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act."

The power to enter into a charter being *expressly granted* elsewhere in the statute, that power could be exercised *in the manner* of a private corporation under Section 207. The Administrator could put into the charter such clauses as were common in charters made in private business.

The case, far from supporting appellant, does the reverse. It aptly illustrates the proper limits of the provision in Section 207 relative to private corporations. *If* an express power to do an act *can elsewhere be found*, that power may be exercised in the *manner* of a corporation. But the provision as to corporations does not itself create a power not otherwise expressly conferred. If it did, the rest of the Merchant Marine Act would be futile and unnecessary, and many pages of enactment and many statu-

*The decision was affirmed by this Court, *United States v. Standard Oil Company*, 156 F.2d 312, but no reference to the alleged possession by the Commission of the powers of a private corporation is made.

tory amendments in the 13 years since 1936 would have been a useless waste of good paper.*

4. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP CAN BE IMPLIED FROM THE COMMISSION'S FUNCTIONS AS A GOVERNMENT AGENCY.

Finally, appellant (R. Br. 21-24) argues that the power is to be implied without reference to "powers of a corporation" or any of the matters already discussed.

The argument is grandly vague, sublimely indifferent to any foundation in concrete legislation.

The simple truth is that a power cannot be implied from a vague assemblage of supposed purposes. An implied power can only be derived from express powers, and the implication must be "necessary".†

*Appellant (R. Br. 16) refers to the power of the Reconstruction Finance Corporation to accept securities in discharge of debts. But the R.F.C. is a corporation and the debts are its own. Note what the Supreme Court said about such corporations in *United States ex rel. Skinner & Eddy Corporation v. McCarl*, 275 U.S. 1, discussed in our brief, p. 116.

†The cases cited by appellant as supporting implied powers do not help it here. In *Burns v. United States*, 160 Fed. 631 (2 Cir.) the power to buy land for a sea wall was derived from an express power to build a sea wall together with an express appropriation for the purpose. In *United States v. Threlkeld*, 72 F.2d 464, the power to acquire land for roads was derived from an express power to construct roads and improvements coupled with an express appropriation for the purpose. The limit of these cases is shown by *Chase v. United States*, 155 U.S. 489, which held that the power either to lease or to buy premises for a post office could not be implied from the power of the Postmaster General to "establish post offices" there being no appropriation to purchase or lease. The court held that the power must come "from a statute which either expressly or by necessary implication authorizes him to make such lease or purchase." Moreover, it pointed out that the power to establish post offices must be read in conjunction with the co-existent general statute, Title 41 U.S.C., Sec. 11, which prohibits acquisition of property by government agents without authority of statute.

And in the *Teapot Dome* case (*Pan American Petroleum & Transport Company v. United States*, 273 U.S. 456, at 502) the court held that a power to exchange government oil for storage facilities could not be implied "in the absence of language clearly requiring it." Appellant would distinguish that case (R. Br. 24) on the ground that a lease of government

And so, we ask, to what express power does appellant point to as the source of its alleged implied power? After distillation of the discussion, the residue is the *mere* fact that collection of the debt was entrusted by law to the Commission—no more. *But a power to compromise cannot be implied merely from the power to administer and collect the debt.* We so showed in our brief, pp. 104-107. We find no answer to that discussion. We showed also that a corporate agent for collection of debts has no more authority to compromise those debts than an agent who is a natural person. Appellant (R. Br. 13) asserts that the Commission had power to compromise “debts owed it”. But, as we showed in our brief (pp. 111, 112), the debts involved in this case were not “owed it”; they were debts to the United States.

Appellant says that powers reasonably incident to the performance of statutory functions may be implied. What functions here? The Merchant Marine Act of 1936 did not state that the Commission had a broad objective and let it go at that. It declared a policy—and that policy was to further a merchant marine under private ownership (Sec. 101; 46 U.S.C. Sec. 1101; Sec. 210, 46 U.S.C., Sec. 1120). Then, having declared its policy, Congress proceeded in the Act to specify the administrative functions of the Commission and the authority and the responsibilities which it deemed proper to further the policy which it declared. It did not leave to the Commission the manufacture of such powers as the Commission thought would be desirable in furtherance of that policy. Congress has itself decided what activities should be permitted in order to achieve its ends.

Appellant recognizes that Congress gave a whole series of express and limited grants of power to the Commission to compromise debts, dispose of government property, and to acquire property, all in specific circumstances. It denies that this fact clearly negatives the general all-embracing implied power for which it contends. Its argument compels it to contend that the

property was held to be invalid because procured by fraud and corruption. But that was another issue. It also held that an exchange of oil for storage facilities was invalid for lack of power.

implied power upon which it insists was broader than any of the express powers and comprehended them all, and that the express provisions were not *grants* of power but merely limitations of a broad and unconfined power existing by implication only! In short, the numerous express grants merely subtracted segments from the broad but implied grant! During World War II and the previous and subsequent period of national emergency the Commission frequently came to Congress requesting and obtaining legislation relative to its powers. Yet, according to appellant, the Commission, instead of asking for broader power, was in fact begging for limitations and restrictions on power already possessed!*

Moreover, a power cannot be implied against an express restriction. And we have shown a number of such restrictions.

We showed that whenever Congress desired to empower the Maritime Commission to dispose of government property it said so expressly. Appellant concedes that this is so, but argues (R. Br. 30) that "discharging a liability by compromise is no more a disposition of Federal property, i.e., the chose in action, than would be a discharge by * * * payment in full." The contention is patently unsound, for by receipt of payment in full the payee receives all to which it is legally entitled and gives up nothing. If the argument were sound, any public official charged with

*In the hearings before the Senate Committee on Commerce, 77th Congress, First Session, on S.J. 67 and H.R. 4466, May 1, 7, 8 and 12, 1941, to authorize the Commission to purchase domestic and foreign vessels for national defense, the following passages may be found:

"Senator Clark. Senator, did you ever hear of any representative of the administrative branches of the government placing any limitation on the widest possible grant of blank-check powers?" (p. 136)

"Admiral Land [Chairman of the Maritime Commission]. Mr. Chairman and members of the Committee * * * the Maritime Commission would very much like the law as elastic as practicable, without restrictions, and without any strings to it whatsoever, in order to safeguard the national defense" (pp. 8, 9)

* * * * *

"Admiral Land. No; because the Maritime Commission has asked for wide open legislation, with no strings on it whatsoever." (p. 11)

collecting a debt could accept in satisfaction any substitute performance he saw fit.

Appellant then argues that Congress often spells out expressly what would be implied anyway, citing *United States v. Cors*, 337 U.S. 325, and *Mason v. United States*, 260 U.S. 545. But Mason's case merely applied the "rule that an affirmative statute, without a negative express or implied, does not take away from the common law," and *Cors'* case noted that an affirmative statute might do no more than state for a particular set of facts what was already required generally by the Constitution. In each case there was a pre-existing rule, *not* based on or derived from an expression of Congressional will. But common sense tells us that the situation is different when the rule or power must find its source in an expression of Congressional will, and the very statute from which it is sought to imply such a power covers the field by a series of limited grants. *Lewis' Sutherland on Statutory Construction* (2d ed.), Sec. 491, p. 916. The rule in such a case is that stated in *Texas & Pacific Railway Co. v. Pottorff*, 291 U.S. 245, 253: "powers not conferred by Congress are denied."

Appellant asserts in another context that Title 46 U.S.C., Sec. 1116, which requires all "proceeds of all debts" transferred to the Maritime Commission from the Shipping Board to be placed in the United States Treasury, relates only to money (R. Br. 56). It follows that Congress has *affirmatively* required that the debts entrusted to the Commission to handle must be collected in money only. Appellant hastens to argue (R. Br. 28) "So to construe it [i.e., Section 1116] would create a conflict with 46 U.S.C. 1114, which gave the Commission 'All the functions, powers and duties of the Shipping Board with respects to the ship debts'." But, as we have seen, the Shipping Board had no power to compromise debts due the United States. Again, by the 1938 amendments to Section 202 of the Merchant Marine Act of 1936 Congress expressly conferred on the Commission the power to extend and renew debts. Appellant argues that this express grant was necessary because of a previous express limitation on the powers of the

Commission as successor to the Shipping Board. That limitation, it says, is the provision in Section 5 of the Merchant Marine Act of 1920 (41 Stat. 990, 46 U.S.C. 864) that in selling ships the Board was free to insert in the contract of sale such terms as it thought proper but could not defer payment beyond 15 years. Yet this very provision required sales of ships to be *for money* only. It was under this statute and by virtue of a sale of ships that the debts of Mr. Dollar and Dollar of California to the United States had arisen. If the statute required sale for money only, how could the Shipping Board's successor accept something other than money? If this statute was such an express prohibition of a power to extend credit beyond 15 years as to require a specific enactment in 1938 to permit extension, why was it not also such an express prohibition against accepting anything other than money as to require an express statute to permit the acceptance of stock?

Whenever confronted by a concrete objection, appellant abandons its reliance on vague implications from broad functions and falls back on the contention that the Commission had the powers of a corporation. It repeatedly does so at pages 24-34. Every other argument collapses with its concession at pages 24 and 28 that the regular departments of the government have no such power as it here claims. In trying to give the Maritime Commission a greater power, it rests on the assumption that the Commission had the powers of a private corporation. That assumption is both false and irrelevant.

5. THE TRANSACTION COULD NOT BE CALLED A COMPROMISE.

In our brief (pp. 119-122) we showed that there can be no compromise, *as a matter of law*, unless (a) there is a dispute as to liability or (b) a doubt of collectibility, and that there was never any dispute as to liability of Mr. Dollar or Dollar of California nor any doubt of collectibility from them.

Appellant neither denies the legal rule nor asserts the existence of any dispute as to liability or doubt of collectibility. Instead, it

indulges in argument (Rr. Br. 32-34) to attribute motives to the transferors of the stock for wanting to enter into the transaction. The argument is this: Because the Commission had the power to force a wanton sacrifice of the mortgaged ships at a grossly inadequate price, Mr. Dollar and Dollar of California were persuaded to part with their stock to avoid being called on to pay the notes, and the other transferors, who were not indebted to the United States, were persuaded to do so to protect their investment in preferred stock.

Many things could be said about the facts and law implied in this argument. But taking it at face value, *it still wholly fails to describe a "compromise"*. It simply describes an exchange of property for personal liability. The parties have disputed whether that exchange resulted in an outright transfer of ownership or a substitution of security. But whether the one or the other, it could *not* be a compromise. And so the power to make it cannot be predicated on an alleged power to compromise (see Our Brief, pp. 121, 122).*

*Appellant's argument is unsound in any event. Appellant contends that the possible out-of-pocket with which Mr. Dollar and Dollar of California were confronted was not merely a possible deficiency after mortgage foreclosure on the ships, but the whole amount of their notes. While it is true that they could have been sued on the notes without prior foreclosure (46 U.S.C. Secs. 911, et seq.), they would be subrogated to the rights of the United States not merely against Dollar of Delaware personally but in the mortgage security as well. *Prairie State Bank v. United States*, 164 U.S. 227, 232; *Maryland Casualty Co. v. United States*, 53 F. Supp. 436 (Ct. Cl.). They could have compelled Dollar of Delaware to "exonerate" them, to pay before they were compelled to do so (Restatement of Security, Sec. 112; *Wendlandt v. Sobre*, 33 N.W. 700, 37 Minn. 162), and all questions of liability among all parties would have been adjustable in one proceeding. If Mr. Dollar and Dollar of California were sued jointly, Dollar of Delaware would have had to be joined as a defendant. *Minor v. Mechanics Bank*, 1 Pet. 46, 73; 47 C.J. 69, Sec. 145. If either was sued alone, he or it could have immediately impleaded Dollar of Delaware under Admiralty Rule 56. The suit would have been in admiralty, since the jurisdiction of admiralty was exclusive. *Detroit Trust Company v. The Thomas Barlum*, 293 U.S. 21, 42. The decree of the court in the one suit, resulting in foreclosure of the mortgage, would require application of the proceeds on any judgment against Dollar of California and Mr. Dollar.

Whatever motives appellant seeks to attribute to the transferors, no foundation existed on which the creditor, the government, could predicate a compromise.

It may be noted that as part of the transaction another \$4,500,000 was lent to the steamship line. It would be frivolous to say that the Commission had any doubt of collectibility of the \$7,500,000 when it increased the debt to \$12,000,000. It received nothing that could not already have been subjected to execution to pay a judgment on the debt.

Moreover, appellant's brief states that the Commission's purpose was to acquire ownership in order to deprive the equity holders of any chance of profit from success. That contention at once shows that the argument about compromise is spurious.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

Dated: San Francisco, April 2, 1952.

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Moreover, the mortgages provided that the mortgagee could take possession of the ships, without court procedure, and sell them, with power of attorney to convey in the name of the mortgagor (J.A. 307, 308), and this right would also have passed to the co-obligors. *Prairie State Bank v. United States*, 164 U.S. 227, 232.

Appellant's argument that the other transferors were trying to protect investments in preferred stock ignores the fact that the preferred stock was never imperilled. In consummating the transaction in October 1938 the Commission acted on reports of Commissioner Truitt (J.A. 1264-5) that the mortgaged ships had a value substantially in excess not only of the total debt but of the proposed new debt of \$4,500,000 as well. Since the proposed new debt was $\frac{1}{3}$ greater than the amount of the preferred stock (\$3,359,300 par (J.A. 1293)), the ships were worth more than enough to care for the old debt plus the preferred stock.

No. 13,131

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM R. DAVENA, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

FEB 18 1952

PAUL P. O'BRIEN

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APPELLANT'S OPENING BRIEF.

**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING THE BASIS UPON WHICH IT IS CONTENDED
THAT THE DISTRICT COURT HAD JURISDICTION AND
THAT THIS COURT HAS JURISDICTION TO REVIEW
THE JUDGMENT IN QUESTION.**

This is an appeal from a judgment against the appellant in the United States District Court for the Northern District of California upon a verdict finding the appellant guilty of violations of 26 U.S.C.A. 145(b) (Income Tax Evasion). The charges are in one indictment containing three counts.

The first count charges that on or about the 15th day of March, 1945, in the Northern District of California, Southern Division, William R. Davena, Jr., late of Benicia, California, who during the calendar

year 1944 was married, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their adjusted gross income for said calendar year was the sum of \$3,475.00 and that the amount of tax due and owing thereon was the sum of \$262.97, whereas, as he then and there well knew, their adjusted gross income for the said calendar year was the sum of \$7,244.92, upon which said adjusted gross income there was owing to the United States of America an income tax of \$1,206.03.

The second count pleaded, in essentially the same language, the same offense for the year 1945, a joint income tax return was filed, the declared net income alleged was \$2,972.87, the declared tax owing was \$253.76, whereas the claimed income was \$6,328.52 and the claimed income tax, \$1,085.26.

The third count was the same for the year 1946, as counts one and two, the declared net income alleged was \$3,620.00, the declared tax, \$240.00 and the claimed actual income was \$14,354.88 and the claimed tax \$3,374.96.

The verdict of the jury was guilty of all three counts. The appellant was sentenced to imprisonment

for a period of thirty months on count one; for imprisonment for thirty months on count two; for imprisonment for 30 months and that he pay a fine to the United States in the sum of \$2,500.00 on count three; that the periods of imprisonment imposed on the defendant on counts two and three commence and run concurrently with the period of imprisonment imposed on the defendant on count one.

The United States District Court for the Northern District of California had jurisdiction under the provisions of 26 U.S.C.A. Sec. 145(b) and 18 U.S.C.A. Sec. 3231.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under the provisions of

28 U.S.C.A., Sec. 1291.

Upon conclusion of the case of the prosecution, defendant moved the Court for a judgment of acquittal upon the grounds of the insufficiency of the evidence, principally, a failure to establish the *corpus delicti* save and except by extrajudicial admissions of the defendant, and an improper application of the so-called "net worth-expenditure" method of proving income tax evasion.

After the verdict and within the time allowed by law appellant moved the Court for a new trial upon all the grounds now urged on this appeal and others. The motion was denied and appellant was sentenced as above stated.

Thereafter appellant duly filed his notice of appeal from said judgment against him within the time prescribed by law.

Thereafter, and within the time prescribed by law, appellant filed and served his designation of the record to be sent up on appeal, and thereafter and within the time prescribed by law, appellant filed and served a statement of points upon which appellant intends to rely on appeal.

Thereafter and within the time prescribed by law and by order of said United States District Court, the record in this case, including the transcript of all testimony and all exhibits separately and directly certified, was filed with the clerk of this Court together with a statement of points to be relied upon on appeal.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

As stated above, appellant was convicted of income tax evasion in wilfully and knowingly filing false and fraudulent individual returns in each of the years 1944, 1945 and 1946.

THEORY OF THE PROSECUTION.

The appellant in all of said years and for many years theretofore had been Chief of Police and Chief of the Fire Department of the City of Benicia, Solano County, California.

It was the contention of the prosecution that the defendant failed to report on his income tax returns a substantial portion of income which he received during the years 1944, 1945 and 1946.

The prosecution in this case relied upon the net worth theory. In order to establish this theory the prosecution relied upon extrajudicial admissions of the defendant. In order to present this theory to the jury the prosecution called a number of witnesses in an attempt to establish that the defendant had certain assets such as bank accounts, an automobile, model trains, guns and a home, and testimony to the effect that he had received certain income from prostitutes and gamblers. The prosecution then, through its agents, attempted to itemize the various items in such a way as to establish that the defendant's net worth was substantially increased during each of the years in question.

Upon the conclusion of plaintiff's case, defendant moved for a judgment of acquittal upon the grounds hereinabove noted. This motion was denied.

THEORY OF APPELLANT.

The evidence of appellant showed:

(1) That the defendant had received a sum of \$5,000.00 prior to the year 1944 from his mother.

(2) That the appellant did not pay a sum of \$7,000.00 or any such sum of money for a home in the calendar year of 1946.

(3) That the model trains in question were worth approximately \$1,500.00 as of December 31, 1943 and not \$500.00.

(4) That appellee did not show any substantial understatement of appellant's income for any one of the years in question.

(5) That appellee did not establish that the appellant did not keep adequate books and records.

(6) That the case at bar is not a proper case in which to apply the net worth theory as it did not clearly and accurately establish by competent evidence the net worth of the appellant for any one of the tax years in question nor did it produce evidence that excluded all possible source of taxable income from which any increase in net worth and the excess expenditures could have been derived.

SPECIFICATION OF ERRORS.

The appellant makes the following specification of errors and states the following points upon which he intends to rely on the appeal:

(1) That the trial Court erred in denying Appellant's motion for a judgment of acquittal made at the conclusion of Respondent's evidence;

(2) That the verdict of the jury was contrary to the weight of the evidence;

(3) That the verdict of the jury was not supported by substantial evidence;

(4) That the Court erred in denying the appellant's motion for a new trial;

(5) That the Court erred in overruling objections by appellant to questions addressed by respondent's attorneys to the witnesses Donald J. Thurman and Robert W. Davis, which questions related to extrajudicial admissions claimed to have been made by the appellant and which were asked and answered without any proof (other than such purported admissions) that a crime had been committed either before or after such questions were asked and answered.

QUESTIONS PRESENTED IN THIS CASE.

The first question presented in the case at bar is as to whether or not the appellee was entitled to rely upon the net worth theory. Secondly, assuming that appellee was entitled to rely upon said net worth theory was the evidence sufficient to establish that the appellant wilfully and knowingly attempted to evade a substantial portion of income tax due the appellee for the years 1944, 1945 and 1946.

STATEMENT OF FACTS.

The Government called as its first witness one John H. Reedy, Deputy Collector of Internal Revenue, First District of California (R. Tr. p. 28, lines 5-11). Mr. Reedy produced the original tax returns of appellant for the years 1943, 1944, 1945, 1946, 1947 and 1948. The 1943, 1944, 1945 and 1946 returns were introduced as appellee's Exhibits 1, 2, 3 and 4 (R. Tr. p. 21, lines 12-15).

The second witness called by the Government was one Jerry Robinson who testified that she ran a rooming house in Benicia during the years 1944-1946 and at times on the side a house of prostitution (R. Tr. p. 33, lines 8-12). Mrs. Robinson was asked if she had any financial transactions with the appellant during the years 1944-1946 and in reply to this question testified that she gave the appellant a Christmas present now and then but that it did not amount to very much (R. Tr. p. 33, lines 14-16). She further testified that she really did not know how much money she gave to the appellant during that period of time but that it might have been three or four hundred dollars. However, she further testified that she really didn't know how much she had given the appellant "because if I said I did I don't really remember. I may have given him \$50.00 at Christmas but I don't really know". (R. Tr. p. 33, lines 22-24.) Mrs. Robinson testified on cross-examination as follows:

"Mr. Seawell. Q. You stated, Mrs. Robinson, that you gave him a Christmas present or two, is that correct?

A. Yes, sir.

Q. And that is the only occasion upon which you recall giving him any money, is that correct?

A. Well, I don't really know, I may have given him a little present some other——" (R. Tr. p. 34, lines 19-25).

The witness was asked as to whether she could recall ever having given the appellant any money other than at Christmas time as a Christmas present and she testified that the only other present she recalled giving the appellant was on the occasion when she had had a lot to drink and the appellant told her to go home. She did not recall the amount of money that she gave him but testified "he was kind to me so I just gave him a little present" (R. Tr. p. 36, lines 7-12). The witness was asked how she had arrived at her estimate of having given the appellant presents in the sum of three hundred or so dollars during the years in question and she testified as follows in that regard:

"Mr. Seawell. Q. You have an estimate of giving him three hundred and some odd dollars. Now, how did you arrive at that figure?

A. Well, I don't know, I just arrived at it because I figure three Christmases would be 150, and then a little bit—I don't know; I said I don't know really.

Q. You don't really know how much you gave him, do you?

A. That is right, I don't really know how much." (R. Tr. p. 36, lines 12-19.)

"Mr. Seawell. Q. But you base your recollection on that fact that there were three Christ-

mases between 1944 and 1946 and you just imagined or assumed that you gave him \$50.00 each Christmas, is that correct?

A. Yes, sir.

Q. You have no independent recollection of doing that?

A. No, I don't." (R. Tr. p. 37, lines 2-8.)

The Government then called one Frank Bernardo, who is the manager of the Bank of America at Benicia and he produced the records of the bank setting forth the amount of money the appellant had on deposit with that bank. These records reflected that appellant had the following sums in his savings account:

December 31, 1943	\$504.08
1944	920.39
1945	929.61
1946	1090.05

and that the above figures included accrued interest (R. Tr. p. 39, lines 1-9). The witness further testified that the appellant also had a commercial account and that the balances were as follows:

December 31, 1943	\$635.60
1944	791.30
1945	1061.60
1946	847.42

(R. Tr. p. 39, lines 13-18.)

The witness also testified that the appellant purchased a cashier's check on December 7, 1945 in the sum of \$3,758.56 (R. Tr. p. 39, line 24 to p. 40, line 2).

The next witness called by the appellee was one Robert E. Arvedi, an officer of the main branch of the Bank of America at Vallejo, California. The witness testified that the appellant opened a savings account with that bank on the 15th day of July, 1946 and that the only deposit made to that account was the initial deposit in the sum of \$6,000.00 and that the balance in said account as of December 31, 1946 was \$6,000.00 (R. Tr. p. 40, line 23 to p. 42, line 8).

The next witness called by the appellee was a Mr. Gary Rees, manager of the Solano County Title Company (R. Tr. p. 42, line 23). He testified that his records showed that the appellant paid to his company the sum of \$3,758.66 on the 8th day of December, 1945; that this sum was received in the form of a cashier's check drawn on the Bank of America at Benicia (R. Tr. p. 43, lines 11-15).

The next witness called by appellee was a Mrs. Leonora F. Silveira (R. Tr. p. 45, line 1) who testified that she sold a house to appellant for \$4,913.00 in July of 1943 and that the appellant made monthly payments on said purchase in the sum of \$35.00 per month (R. Tr. p. 47, lines 11-20).

The next witness called by appellee was a Mrs. Mary Russold who testified that the appellant paid to her husband \$750.00 for the remodeling of certain property in the year 1945 (R. Tr. p. 48, lines 23-25) and \$400.00 in 1946 (R. Tr. p. 49, lines 1-4).

The next witness called by appellee was Genevieve Bennett who testified that she had a financial transaction with appellant either in the latter part of 1946

or the first part of 1947 (R. Tr. p. 51, lines 16-19). That the financial transaction involved the purchase of a house at 125 West J Street, Benicia, by the appellant for \$7,000.00 (R. Tr. p. 51, line 22 to page 52, line 1).

The next witness called by appellee was E. R. Tretheway, credit manager for the Earl C. Anthony Automobile Company, San Francisco (R. Tr. p. 56, line 7) whose records reflected that on May 31, 1944 a 1942 model four-door Packard sedan was sold to the City of Benicia for the sum of \$2,172.91 and that the car was delivered to the City of Benicia (R. Tr. p. 56, line 16 to p. 57, line 5). It also appears from his testimony that the car was paid for by the appellant but was to be used by appellant in his official capacity as Chief of Police of Benicia (R. Tr. p. 57, line 25 to p. 58, line 12).

Next the appellee called one Frank Coronado, automobile dealer of Vallejo, California who testified that appellant purchased a 1946 Packard Sedan, September 11, 1946 for \$2,611.11 and that he received in trade a 1942 Packard automobile for which he allowed appellant \$1,268.00 credit (R. Tr. p. 59, lines 18-24). However the witness further testified that he repurchased the automobile on April 20, 1948 for the sum of \$2,500.00 (R. Tr. p. 61, lines 4-7).

The next witness called by appellee was Anna G. Pine who testified that she was the City Clerk of the City of Benicia; that the City of Benicia paid the appellant \$40.00 per month plus gasoline and oil to be used by him in the operation of a Packard auto-

mobile; that the payments in the amount of \$40.00 started in September, 1946 and that prior thereto the city had paid all maintenance costs for the automobile (R. Tr. p. 65, lines 3-22).

The next witness called by appellee was Donald J. Thurman, special agent of the Bureau of Internal Revenue. Mr. Thurman's testimony was in regard to statements which he had taken from the appellant. His testimony was given over the objection of the appellant (R. Tr. p. 73, lines 1-25). Mr. Thurman testified that he first contacted the appellant on February 23, 1949; that he at that time questioned him in regard to his income tax returns for the years 1944, 1945 and 1946. The appellant advised Mr. Thurman that he had received a gift and/or inheritance about three years prior thereto in the sum of \$5,000.00; that this money was received in cash from his father and that this money had been left to appellant by his mother at the time of her death (R. Tr. p. 80, lines 3-8).

The agent further testified that appellant advised him that he had received a few gifts from one Jerry Robinson, these gifts consisting of \$50.00 a couple of times (R. Tr. p. 81, line 24 to p. 82, line 3).

The agent further testified that he received an affidavit from appellant, the same being dated the 5th day of May, 1949, which affidavit purports to state "1947 gift from mother \$5,000.00". It is also to be noted at this point that there is a line drawn through this statement of appellant. This document is Exhibit No. 8 and it is apparent from the document

that an attempt had been made to delete this statement from the affidavit (R. Tr. p. 85, line 25 to p. 87, line 8).

Mr. Thurman testified that he again interviewed the appellant on the 22nd day of July, 1949 (R. Tr. p. 87, lines 9-11) and in questioning him asked him if he would explain why he had omitted certain alleged income from his tax returns; that the appellant at that time stated "I figured they were just hand-outs, a sort of a gift, I didn't know I had to pay income taxes on them. I don't know too much about it." (R. Tr. p. 89, lines 11-16.)

The agent further testified that at the end of the interview on July 22, 1949 a Mr. Russold asked the appellant "You didn't report the full amount of your income; that is, you haven't declared the gratuities for fear of apprehension from local authorities." And then he asked him was it for the purpose of evading his income taxes, and Chief Davena replied, "Absolutely not." (R. Tr. p. 89, line 24 to p. 90, line 3.)

The agent further testified that at the time of his first interview with appellant he asked the appellant if he did not know that the payments that he had received were taxable and the appellant replied yes that he knew the amounts were taxable because there was so much information about it in the newspapers *nowadays*. (R. Tr. p. 90, lines 15-21.)

The agent testified that the appellant took him to the Bank of America and opened a safe deposit box which he, the appellant, had rented and in the agent's presence, and that he, the agent, made an inventory

of the items in the safe deposit box (R. Tr. p. 107, line 21 to p. 108, line 4); that the safe deposit box contained a marriage license of the appellant, a policy of title insurance on a home, five \$25.00 bonds, two \$100.00 bonds; that the bonds were in the name of the children of appellant; that there was nothing of an unusual nature in the safe deposit box (R. Tr. p. 108, line 21 to p. 109, line 19).

The agent further testified that appellant advised him that in the year 1947 he had reported \$800.00 as promotions on his income tax return and also advised him he was going to report approximately \$1,900.00 as promotional income which he had received in the year 1948 (R. Tr. p. 114, lines 15-20).

The agent also testified that the appellant advised him that he had a net worth of about \$5,300.00 when he was married in 1938 (R. Tr. p. 123, lines 8-18).

The agent also was asked the following question and gave the following answer:

“Q. Now, any place in your records, the notes that you took, or anything that you remember, at any time did Chief Davena in the conversation of February 23rd or the conversation of March 8, 1949, tell you that he had received any gifts from anyone other than the three \$50.00 gifts from Jerry Robinson prior to 1947?

A. No.” (R. Tr. p. 130, lines 13-19.)

The agent in referring to the real estate alleged to have been purchased and paid for by the appellant in the year 1946 for the sum of \$7,000.00 testified that the transaction in question might have taken place in

1947 rather than in 1946 and that if this were so that there would necessarily be a correction in the net worth of the appellant in the sum of \$7,000.00 (R. Tr. p. 141, lines 6-18). The agent further testified that of course it was possible that the appellant could have received the \$7,000.00 and/or \$7,150.00 which was paid on the property in 1947 by borrowing the money or in many other different ways (R. Tr. p. 142, lines 1-13).

The agent also testified that he received a letter from Harold M. Simon, attorney for appellant, some time after December 7, 1949 calling his attention to the fact that the appellant had made several errors in his statement to the agent and wished to correct them. The agent testified that after receiving said letter that he did not communicate with anyone in regard to the errors and did not make the corrections called to his attention (R. Tr. p. 153, line 21 to p. 154, line 3).

The next witness called by the appellee was Robert W. Davis, Deputy Collector of Internal Revenue, First District of California (R. Tr. p. 162, lines 11-17). He testified that he had a conversation with the appellant on or about the 24th day of October, 1949 (R. Tr. 163, lines 1-3); that at that time appellant stated that he wished to cooperate with the Department of Internal Revenue in any way possible and that he had done so up until that time. The agent testified that the appellant had cooperated with his department and that he, the appellant stated "he wanted to do what was right, and he stated that if

he had known these returns, these income tax returns, were strictly confidential, that he would have reported this outside income he had been receiving." (R. Tr. p. 164, lines 9-14.)

The agent further testified that he had made some investigation of the appellant's charge accounts in various stores in Oakland and Vallejo (R. Tr. p. 163, lines 4-25), but that he did not attempt to ascertain what indebtedness the appellant had in stores other than those referred to above.

The next witness called by the appellee was Augustus V. Brady, Technical Adviser with the Penal Division, the Chief Counsellor's office of the Bureau of Internal Revenue, San Francisco (R. Tr. p. 178, lines 18-24). He testified that he had made a number of computations at the request of the appellee; that these computations were based on hypothetical questions which were submitted to him by the appellee. The witness made a number of computations for both the appellant and appellee. One of the computations made for the appellee assumed that certain electric trains had a value of \$500.00 as of December 31, 1943. Another computation made for the appellant assumed that the trains had a value of \$1500.00 as of December 31, 1943 (R. Tr. p. 203, lines 7-23). The witness then at the request of the appellant computed the amount of tax which the appellant would owe for the years 1944, 1945 and 1946 assuming that he had filed a separate return and assuming that the trains in question had a value of \$1,500.00 as of December 31, 1943 and that appellant did not purchase a house

in 1946 for \$7,150.00 but rather purchased the house in the year 1947. The witness testified that the amount of tax due the appellee would have been \$485.00 for the year 1944; \$432.00 for the year 1945; and \$1,297.22 for the year 1946 (R. Tr. p. 225, line 13 to p. 226, line 8).

The agent was asked the following questions and gave the following answers in regard to the total deficiency of the appellant assuming he had filed a separate return:

“Mr. Maxwell. I will withdraw the question, Mr. Brady. Would the difference on a separate return basis be substantial?

A. There would be a deficiency in any event.

Q. There would be a deficiency in any event?

A. Yes.” (R. Tr. p. 229, lines 12-16.)

The witness further testified in regard to this subject as follows:

“Mr. Seawell. Q. And by a deficiency in any event you mean a dollar or two dollars, or what do you mean?

A. Well, no—I mean it would be a deficiency of, say, several hundred dollars.

Q. Well, it would be much lower than these figures on the blackboard he has just put on?

A. Well, they would be, yes.

Q. Well, let me have those figures.

A. Well, if I can just have—— (The witness computes figures.)

The Witness. O.K. For 1944, \$266.52.

Mr. Seawell. \$266 and how much?

A. Fifty-two cents.

Q. What is that?

A. That is the deficiency in tax, based on separate computation rather than joint computation.

Q. And you are using the figures in Government's Exhibit 9, is that correct?

A. That is correct.

Mr. Maxwell. Just a moment. You are using what figures?

A. I am using the figures before correction.

Mr. Maxwell. Before correction?

Mr. Seawell. You are using these totals here (indicating), aren't you?

A. Yes, \$23,000—before the corrections.

Q. Yes, that is right.

A. You want the rest of that answer, Mr. Seawell? 1945?

Q. Yes.

A. \$126.12. 1946, \$296.00.

Q. The total deficiencies for all the years involved in this case, then, would be \$688.64, is that correct?

A. I wouldn't say that. Based on the assumption you gave me, yes.

Q. Yes, based on the question, the hypothetical question, that is what you are testifying to as an expert, isn't that right?

A. Based on your hypothetical question.

Q. Now, let's get back to this. This includes some other person besides the defendant's tax, is that correct, or do you lead this jury to believe that is what the defendant would owe?

A. That would be the joint returns of husband and wife.

Q. That would be for both of them?

A. Yes.

Q. So he personally owed half of that?

A. Well, if they filed joint returns. They made an election to file that way. He would be liable jointly and severally for that tax.

Q. But the defendant in this case owed half of that? That would be his part of it, so to speak, would it not?

A. No, I think not. Community property is based—the husband has control of the community property. Wouldn't he be liable for the wife's liabilities?

Q. Under certain circumstances, and you can will—his Honor will tell you—upon the death of one you can will part of the property away and not the other part.

A. But I feel on the joint return that would be the amount of tax due and owing.

Q. But at any event these figures would be correct under the question presented to you, is that correct?

A. To the best of my ability." (R. Tr. p. 229, line 19 to p. 232, line 3.)

ARGUMENT.

From a reading of the testimony in its entirety in this case it can readily be seen that the appellee attempted to prove that the appellant failed to report all of his taxable income by what is known as the net worth theory. That is, the appellee attempted to establish the appellant's net worth as of December 31, 1943 and then to establish his net worth at the end of the years 1944, 1945 and 1946. Appellee then subtracted the total of appellant's net worth from the amount of income reported for the years in question

and thus attempted to arrive at his taxable income. The appellee did not take into account the fact that appellant had a net worth of some \$5,300.00 at the time of his marriage in 1938 nor did it take into account the fact that he had received a gift in the sum of \$5,000.00 from his mother, some three or four years prior to the start of the investigation of this case. The appellee in arriving at the net worth for the appellant has assumed the facts which were most detrimental to the appellant's position. For example, the appellee has attempted to reduce the net worth of the appellant by one thousand dollars by valuing the electric train in question in this case at \$500.00 whereas appellant had told it that they were worth some \$1,500.00 on December 31, 1943. Another example is the fact that the appellee in its computations disregarded the fact that the appellant had received a gift of \$5,000.00 from his mother. Assuming this to be true this would of course reduce the appellant's net worth so far as taxable income is concerned by that amount.

It will also be noted at this time that the appellee's original computations made by its agent, Mr. Brady, also assume that the appellant had paid some \$7,150.00 for his home and that said payment was made in the year 1946 whereas the evidence developed that the payment was not made until January 7 of 1947. This of course would again reduce the net worth of the defendant for the year 1946 by that amount. The original computation of Agent Brady made for the appellee was also based on the fact that the appellant

filed a joint return. It is to be noted that the testimony in this case established that the defendant was married during the years in question and that if he so desired he could have filed a separate return and that if he had done so and been given credit for the corrections which should have been made, his total tax due the appellee for the three years in question would have been \$344.32, that is it would have been one-half of the \$688.64 which agent Brady testified would have been the total deficiency for his wife and himself for the three years in question (R. Tr. p. 229, line 19 to p. 232, line 3). In other words the amount of the deficiency would certainly not have been substantial and therefore would not have supported a conviction in this case. It is well established that appellee must prove that a substantial portion of the tax which it alleges to be due the government was knowingly and wilfully defeated and evaded by the appellant.

Gleckman v. U.S., 85 Fed. (2d) 394;

Tinkoff v. U.S., 86 Fed. (2d) 868.

The only witness that the appellee called to testify that certain payments were made to the appellant that were not reported by the appellant was one Jerry Robinson. Her testimony was simply to the effect that she had given the appellant a Christmas present or two (R. Tr. p. 34, lines 19-25); that she had no independent recollection of the amount of money that she gave to the appellant as a present but she just imagined or assumed that she had given appellant approximately \$50.00 as a Christmas present in each

of the three years in question (R. Tr. p. 36, lines 12-19, p. 37, lines 2-8). Mrs. Robinson also testified that she might have given the appellant a small present on one occasion when she had been drinking and he had befriended her. It is from the testimony of this one witness that the appellee has tried to establish that the appellant received substantial amounts of income which he did not report during the years in question. A reading of the testimony of the witness Robinson in its entirety we submit would lead any reasonable person to the conclusions that she did not give any large or substantial sums to the appellant and secondly any sums that she gave to the appellant were given not for any particular service performed by the appellant but simply given in the nature of Christmas presents which were so small that she, as a matter of fact, had no independent recollection of the amounts she gave appellant. We submit that the appellee is attempting in this case to convict the appellant not because he had received any substantial income which he did not report but simply because he had received a Christmas present from a person who at one time was a prostitute.

We further submit that the testimony of the witness Robinson should be disregarded in its entirety as her testimony was contradictory throughout and for the further reason that she testified positively that she had no independent recollection of giving the appellant any sums of money (R. Tr. p. 37, lines 2-8).

The only testimony of any consequence against the appellant in this case was that of the Internal Revenue Agents, Thurman and Davis. This testimony was introduced over the objection of the appellant. We submit that the facts and circumstances surrounding the conviction of the appellant in this case fall squarely within the rule applying to net worth cases as set forth in the case of *U. S. v. Fenwick*, C.C.A. 7 Circuit, Nov. 4, 1949, 177 Fed. (2d) 488. In the *Fenwick* case one Helen J. Fenwick was convicted in the United States District Court, Southern District of Indiana, of income tax evasion for the years 1943 and 1944. At the trial the Government offered no evidence other than a "net worth-expenditures" balance sheet to show the evasion of income taxes. The Court says, pages 489 and 490:

"(1, 2) In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. *Pines v. United States*, 8 Cir., 123 F. 2d 825, 829; *Forte v. United States*, 69 App. D.C. 111, 94 F. 2d 236, 243, 127 A.L.R. 1120; *Gordiner v. United States*, 9 Cir., 261 F. 910, 912; *United States v. Chapman*, 7 Cir., 168 F. 2d 997 at page 1001. In the latter case we said: 'Appellant contends that, "In a 'net worth case,' the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to con-

vict.” We fully agree with his statement of the law.’ In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. *Gleckman v. United States*, 8 Cir., 80 F. 2d 394, 399; *United States v. Miro*, 2 Cir., 60 F. 2d 58, 61; *O’Brien v. United States*, 7 Cir., 51 F. 2d 193, 196. Inasmuch as there is no direct proof that defendant received income which he did not report, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant’s implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient.”

The Court then proceeded to review the evidence in that case and showed that the Government’s information as to beginning net worth was based entirely upon an examination of defendant’s “cancelled checks, bank statements and miscellaneous memoranda”. The Court says, on pages 490 and 491:

“(3) The weakness of the government’s position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant’s net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and

accurately established by competent evidence. *Bryan v. United States*, 5 Cir., 175 F. 2d 223; *United States v. Chapman*, 7 Cir., 168 F. 2d 997, 1001; *United States v. Skidmore*, 7 Cir., 123 F. 2d 604, 608. By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943.

* * * * *

“* * * the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him. * * *

“(4) As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Thus in *Bryan v. United States*, 5 Cir., 175 F. 2d 223, 225, the court said: ‘The net worth expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since * * * no claim of evasion is based upon the deductions from gross income reported by the Defendant, and since there is no evidence that the gross expenditures by the Defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to ex-

clude, all other available sources from which the additional funds expended could have been derived. If the Defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the Defendant or included by the Government's computation of net worth. * * * the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in * * *. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant. * * * the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.' This supports the decision of this court in *United States v. Chapman*, 7 Cir., 168 F. 2d 997, 1001."

In this case, agent Brady proceeded to go right down the list of all assets and liabilities stated in his balance sheet, and excepting where the appellant had stipulated to facts, the figures were based wholly upon hearsay.

In *United States v. Fenwick* (C.C.A. 7th Ct., Nov. 4, 1949), 177 F. (2d) 488, discussed supra, the Court further said on page 492:

"Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evi-

dence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

It is also to be noted that the record in this case does not indicate that the appellee attempted to or did prove that the appellant's books were inadequate. The records disclose that the appellant kept all records that a man in his position, to-wit, chief of police, would ordinarily keep, that is his bank accounts and a record of any financial dealings which he might have entered into such as purchase of an automobile or a home. The Court instructed the jury in this regard as follows:

"The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of

the taxpayer; but if no such method of accounting has been employed or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as, in the opinion of the Commissioner, does fairly reflect the income.

The Government is authorized by law, when the books are found to be inadequate, to adopt a reasonable method of ascertaining income. And so in this case it has undertaken to find out what the defendant was worth at the beginning of the year and what he was worth at the end of the year, so as to show what he had accumulated as income in the meantime.

If, at the end of the year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, unless he got it by gift or inheritance or loan, it would seem that he got it by earning it, and that it was part of his income.

Charge of the Court in *United States v. Flacomio*, D.D. Md."

We submit that the appellee did not establish that the books of the appellant were so inadequate that they were unable to determine his net income and for that reason the appellee was not entitled to rely upon the net worth theory. It is obvious that if the appellee had evidence to the effect that the appellant's income was substantially greater than that reported that it would have subpoenaed the records and all the persons who had contributed to his income. This it failed to do.

CONCLUSION.

We submit that there was no substantial evidence in the record in this case from which the Court or jury could find or infer that the appellant had received substantial income in excess of that which he reported in his income tax returns for the years 1944, 1945 and 1946. At the outside the testimony would establish that the appellant received Christmas presents which were of a minor nature. We submit that the appellee did not bring its case within the net worth theory for the reason that it did not produce evidence that excluded all possible available sources of taxable income from which the increased net worth and the excess expenditures (if any) could have been derived.

We again wish to call this Honorable Court's attention to the fact that when you exclude the testimony of Agents Thurman and Davis, which testimony should not have been allowed for the reasons heretofore stated, that there is not one scintilla of evidence produced by the appellee on which a jury might base a judgment of conviction.

We respectfully submit that the judgment of conviction should be reversed.

Dated, Sacramento, California,

February 13, 1952.

Respectfully submitted,

EMMET J. SEAWELL,

HAROLD M. SIMON,

Attorneys for Appellant.

No. 13,131

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM R. DAVENA, JR.,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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No. 13,131

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM R. DAVENA, JR.,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**On Appeal from the District Court of the United States
for the Northern District of California.**

BRIEF FOR THE UNITED STATES.

**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING THE BASIS UPON WHICH IT IS CONTENDED
THAT THE DISTRICT COURT HAD JURISDICTION AND
THAT THIS COURT HAS JURISDICTION TO REVIEW
THE JUDGMENT IN QUESTION.**

The appellant, William R. Davena, Jr., was indicted on February 21, 1951, in the District Court for the Northern District of California, Southern Division, as follows:

Count One—for willfully and knowingly attempting to evade and defeat income tax due and owing by him and his wife in the amount of \$943.06 for the calendar year 1944, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b).

Count Two—for willfully and knowingly attempting to evade and defeat income tax due and owing by him and his wife in the amount of \$831.50 for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b).

Count Three—for willfully and knowingly attempting to evade and defeat income tax due and owing by him and his wife in the amount of \$3,134.96 for the calendar year 1946, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b).

The appellant was arraigned on March 14, 1951, before United States District Judge George B. Harris, at which time appellant moved to have the plea and all further proceedings removed to the United States District Court for the Northern District of California, Northern Division, by reason of the residence of the appellant at Benicia, Solano County, California, within that Division, and it was so ordered. On April 11, 1951, the appellant entered a plea of "not guilty" to each count of the indictment. Trial was had in the District Court before the Honorable Dal M. Lemmon, District Judge, and on July 12, 1951, the jury returned a verdict finding the appellant guilty on each count of the indictment. On July 13, 1951, the District Court adjudged the appellant guilty as charged and convicted and ordered him committed to the custody of the Attorney General for a period of thirty months on each count, such sentences to run concurrently, and further ordered him to pay a fine of \$2,500 on the third count, in the event of the nonpayment of which he was to be further imprisoned

until the fine was paid or until he was otherwise discharged pursuant to law. (R. 234.) Immediately prior to judgment, appellant moved for a new trial, which motion was denied. (R. 234.)

Notice of appeal was filed on July 13, 1951, and bail on appeal set at \$10,000. (R. 236.)

STATUTE INVOLVED.

Title 26, Internal Revenue Code; Sec. 145(b):

PENALTIES

* * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

During the years 1944 to 1946, inclusive, the appellant, William R. Davena, Jr., was regularly employed as Chief of Police and Chief of the Fire Department of the City of Benicia, California. (R.

64, 70.) He had held the position of Police Chief for a period of five years until May of 1948, and at the time of trial had been Fire Chief for approximately eighteen years. (R. 70, 103.) He was paid a salary by the City of Benicia during 1944 to 1946, inclusive, and after September 3, 1946, received \$40 a month maintenance for his automobile from the City. (R. 66, 70.) A small amount of additional income from services of legal papers was reported on his returns. (Government's Exs. 2, 3, 4.)

On March 15, 1945, William R. Davena, Jr., and Genevieve Davena, his wife, filed a joint income tax return for the year 1944, reporting an adjusted gross income of \$3,475 and income tax of \$262.97. (Government's Ex. 2; R. 29.) On April 15, 1946, they filed a joint return for the year 1945, reporting net income of \$2,972.87 and income tax of \$253.76. (Government's Ex. 3; R. 29.) On April 4, 1947, a joint return for the year 1946 was filed reporting net income of \$3,620 and tax of \$240. (Government's Ex. 4; R. 29.) Only the salary received from the City of Benicia and miscellaneous fees for the service of legal papers were reported on these returns. (R. 88.)

Jerry Robinson testified that she ran a rooming house in Benicia which was, at times, a house of prostitution on the side during the years 1944 to 1946, and that during that time she gave the appellant three or four hundred dollars, hoping for favors. (R. 33, 36.) The appellant stated on several occasions to Donald J. Thurman, Special Agent of the Bureau of Internal Revenue, that he had received money from

a madam named Jerry Robinson, and generally from gamblers (gambling) and prostitutes (prostitution) during the years 1944 to 1946, inclusive, and that he had received no other unreported income during the period. (R. 81, 82, 88, 89, 115, 116, 118, 120.) He also stated to Mr. Thurman that he kept no record of this income, which he called "promotion" income, nor was Mr. Thurman able to find such records or any third-party records. (R. 83.) The money which the appellant received from this source was not deposited in a special bank account; however, a portion of it was used to liquidate the mortgage on his home in the amount of \$3,758.66, and another part (\$6,000) was deposited to a savings account with the Bank of America in Vallejo, California. (R. 89, 41.) The appellant stated to Mr. Thurman that this account in Vallejo was established because he "didn't want the local people to know that he had more money coming in than would be accounted for by his salary." (R. 83.)

Witnesses to establish the net worth of the appellant at the end of each of the years 1943 to 1946, inclusive, were presented by the United States as follows:

(1) Frank Bernardo, Manager, Bank of America, Benicia, California, testified that the balances in the appellant's savings and commercial accounts at that bank were as follows:

	<u>SAVINGS ACCOUNT</u>	<u>COMMERCIAL ACCOUNT</u>
December 31, 1943	\$ 504.08	\$ 635.60
December 31, 1944	920.39	791.30
December 31, 1945	929.61	1,061.60
December 31, 1946	1,090.05	847.42

He also testified that appellant purchased a cashier's check for \$3,758.56 in cash on December 7, 1945. (R. 38, 39, 40.)

(2) Robert E. Arvedi, officer of the Bank of America, Main Branch, Vallejo, California, testified that appellant opened a savings account at his bank on July 15, 1946, depositing \$6,000 in cash at that time, and that the balance of that account on December 31, 1946, was \$6,000. (R. 40, 41, 42.)

(3) Gary Rees, Manager of the Solano Title Company, Solano, California, testified that his records showed the receipt of a cashier's check of \$3,758.66 on December 8, 1945, from Davena, which amount was paid to Eduardo A. Silveira and his wife by the company in satisfaction of the balance due of the sale price of 127 West "J" Street, Benicia. (R. 42, 43, 44.)

(4) Mrs. Leonora F. Silveira testified that she owed the seller's interest in the 127 West "J" Street property, having acquired it on July 1, 1943, when the balance due on the purchase of that property by Davena was \$4,913. She stated that Davena thenceforth paid \$35 a month principal and interest until December 5, 1945, when he informed her that he wanted to pay the balance; and that she received a check therefor out of escrow on April 12, 1946. (R. 45, 46, 47; Government's Ex. 7.)

(5) Mary Russold testified that her husband made certain improvements to the Davena residence, and that \$750 was paid in the latter part of 1945 and \$400

in January 1946 by Davena for such work. (R. 48, 49.)

(6) Genevieve Bennett testified that she sold the appellant a house at 125 West "J" Street, Benicia, California, in the latter part of 1946 or not later than January 1947 for a total price of \$7,150, which was paid in cash. (R. 51, 52.)

(7) E. R. Trethway, Credit Manager, Earl C. Anthony, Inc., San Francisco, California, testified that his company delivered a Packard automobile to the City of Benicia on May 31, 1944, at a total cost of \$2,172.91, and it was then stipulated that the automobile had been purchased by the appellant and paid for by him from his own funds. (R. 56, 58.)

(8) Frank Coronado, automobile dealer, Coronado, California, testified that the appellant purchased a Packard automobile from him on September 11, 1946, for \$2,671.53, less trade-in allowance on a 1942 Packard of \$1,268, and that the appellant paid the difference in cash. He further stated that he repurchased the same automobile from the appellant on April 20, 1948, for \$2,500. (R. 59, 60, 61.)

(9) Donald J. Thurman, Special Agent of the Bureau of Internal Revenue, testified that he examined the appellant's safety deposit box at the Bank of America, Benicia, on February 23, 1949, and found therein War Bonds of the face amount of \$100 purchased in 1942 and 1943, of \$125 purchased in 1944, and of \$100 purchased in 1945, and that the purchase

price was three-fourths of the face amount. (R. 77, 78.) He stated that the appellant told him that he had purchased these bonds from his own funds, and that they were in the joint names of the appellant and his minor children or his wife. (R. 79.)

(10) Mr. Thurman further stated that he had made an investigation to determine the liabilities of the appellant at the end of the years 1943 to 1946, inclusive, but was unable to find any such except the loan payable to Eduardo Silveira, which had been made in connection with the purchase of his residence. (R. 156.)

(1) Robert W. Davis, Deputy Collector of the Bureau of Internal Revenue, testified that he investigated a claimed gift or inheritance to the appellant from his mother, and found that there was no probate record of such an estate in the county of her residence. (R. 165, 166.)

He further testified that he made an investigation to determine charge accounts which appellant may have maintained, but found no such at firms with which appellant had stated he had dealt. (R. 166.)

(12) John H. Reedy, Deputy Collector of the Bureau of Internal Revenue, testified that the records of his office showed that the appellant paid taxes of \$285.60 in 1944, \$270 in 1945, and \$188.80 in 1946, and that he received a refund of 1943 taxes in 1944 of \$52.51, a refund of 1944 taxes in 1945 of \$22.63, and a refund of 1945 taxes in 1946 of \$16.24. (R. 32; Government's Exs. 1, 2, 3, 4.)

(13) Augustus V. Brady, Technical Advisor, Penal Division, Office of Chief Counsel, Bureau of Internal Revenue, testified as an expert witness as to the computation of allowable depreciation on automobiles used for business purposes and as to the computation of income by the net worth method. (R. 183 *et seq.*) According to his computations, depreciation would be allowable to the defendant in the respective amounts of \$334.52 for the year 1944 (R. 182, 185); \$402.12 for 1945 (R. 186); and \$490.83 for 1946. (R. 186, 187.)

The foregoing independent evidence of net worth was supplemented by admissions which the appellant made to Mr. Thurman and Mr. Davis on several occasions and, in particular, by a document signed by the appellant and submitted by him to the Government. (Government's Ex. 9; R. 94.) This document was prepared by the appellant and received by the Government agents from Hartley Russell, the appellant's tax adviser. (R. 93.) Mr. Thurman and Mr. Davis took it to the office of Mr. Russell on December 7, 1949, where they met with Mr. Davena and Mr. Russell. (R. 91, 94.) The details of appellant's net worth, as originally set out by typewriter on Exhibit 9 were individually discussed, and some changes were made by the appellant on the document in his handwriting, after which he signed it. (R. 94.)

The corrections pertinent to the years in question which were made on Exhibit 9 included (1) insertion of year-end balances of appellant's commercial bank account at the Bank of America, Benicia, which had

been omitted from the original schedule (R. 96); (2) increase of furniture from \$2,000 to \$3,000 at the end of 1946 (R. 97); (3) correction of appellant's investment in model trains (R. 97, 98); (4) correction of cost of his wife's fur coat to include excise and sales taxes (R. 98); and (5) correction of purchase price of home and date of purchase. (R. 99, 157.) The original totals were not changed. (R. 99.) All other items on the schedule were discussed and stated to be correct by the appellant. (R. 97, 98.) With respect to the figures of \$6,563 and \$6,963, shown on the schedule as his equity in his home at the end of the years 1945 and 1946, respectively, he stated that this included the original cost of his home, plus the improvements which he had made to it in 1945 and 1946. (R. 97.) He also stated that he had no liabilities during this period. (R. 99.)

At the close of the conference, the appellate wrote the following at the bottom of the schedule:

“This statement of my assets an liability is correct to the best of knowledge and belief.

[signed] “Wm Davena Jr.” (*sic*)

Hartley Russell and Robert Davis then signed as witnesses and dated the document. (R. 99; Government's Ex. 9.)

At an interview with Mr. Thurman on July 22, 1949, Mr. Davena stated that he gave his wife for living expenses during the years in question about \$160 a month and that his house payment was included in this amount. (R. 90.)

At an interview on February 23, 1949, the appellant stated to Mr. Thurman that three years prior he had received \$5,000 in cash from his father, which was money which had been left to him by his mother at the time of her death; that there was no record whatsoever of this gift; and that he spent the money shortly after he received it. (R. 80.) In May of 1949, the appellant mailed a verified document to Mr. Thurman wherein it was stated that this gift was made in 1947. (R. 84, 85; Government's Ex. 8.) On December 7, 1949, after signing the schedule of net worth (Government's Ex. 9), he stated, with respect to this claim, "That is a lie. I never got anything." (R. 100, 166.)

Mr. Brady computed net worth, income and tax due thereon in response to hypothetical questions based on facts and matters in evidence, as follows:

	<u>12/31/43</u>	<u>12/31/44</u>	<u>12/31/45</u>	<u>12/31/46</u>
Assets				
Cash in Savings Acct. #646, Bank of America, Benicia	\$ 504.08	\$ 920.39	\$ 989.61	\$ 1,090.05
Cash in Savings Acct. #3425, Bank of America, Vallejo	-----	-----	-----	6,000.00
Cash in Com'l Acct., Bank of America, Benicia	635.60	791.30	1,061.60	847.42
Cash on Hand	4,800.00	9,000.00	6,000.00	3,000.00
Fur Coat	-----	-----	1,225.00	1,225.00
Equity in Home at 127 "J" St., Benicia	789.00	969.00	4,913.00	4,913.00
Improvements to Above by Russold	-----	-----	750.00	1,150.00
Other Improvements to Above	-----	-----	900.00	900.00
War Bonds	75.00	168.75	243.75	243.75
House at 125 "J" St., Benicia	-----	-----	-----	7,150.00
Furniture at 127 "J" St., Benicia	1,250.00	1,250.00	1,500.00	3,000.00
Model Trains	500.00	500.00	500.00	1,000.00
Automobiles	1,600.00	2,172.91	2,172.91	2,671.53
Guns	200.00	-----	-----	-----
Total Assets	<u>\$10,353.68</u>	<u>\$15,772.35</u>	<u>\$20,255.87</u>	<u>\$33,190.75</u>
Liabilities				
Total Liabilities	None	None	None	None
Net Worth	<u>\$10,353.68</u>	<u>\$15,772.35</u>	<u>\$20,255.87</u>	<u>\$33,190.75</u>
Increase in Net Worth		\$ 5,418.67	\$ 4,483.52	\$12,934.88
Plus—Federal Income Taxes Paid as Shown on Returns— Withholding on Salary		285.60	270.00	188.80
Less—Refund Received on Previous Year's Taxes		(52.51)	(22.63)	(16.24)
Net Amount of Taxes Paid		\$ 233.09	\$ 247.37	\$ 172.56
Living Expenses		1,920.00	1,920.00	1,920.00
Total		<u>\$ 7,571.76</u>	<u>\$ 6,650.89</u>	<u>\$15,027.44</u>
Minus—Depreciation Allowable on Cars Used for Business		334.57	402.12	490.83
Balance—Adjusted Gross Income as Corrected		\$ 7,237.19	\$ 6,248.77	\$14,536.61
Adjusted Gross Income as Reported		3,475.00	3,560.00	3,620.00
Difference—Unreported Income		<u>\$ 3,762.19</u>	<u>\$ 2,688.77</u>	<u>\$10,916.61</u>
Tax Liability		<u>\$ 1,070.60</u>	<u>\$ 899.16</u>	<u>\$ 3,586.95</u>

On the occasion of his first interview with Mr. Thurman on February 23, 1949, appellant stated, when he learned who Mr. Thurman was, "Well, I have been expecting you, there has been quite a bit of talk around Benicia that I was going to be investigated by the Bureau of Internal Revenue ever since about 1947 when the town was closed up." (R. 75.) He was warned at that time by Mr. Thurman that he didn't have to give information and could refuse to talk. (R. 77.)

Appellant also stated at this time that he had received some money from gamblers and prostitutes, but wanted to talk to somebody before discussing the matter with Mr. Thurman. (R. 81.) Mr. Thurman asked him if he thought these payments were taxable, and he said "Yes," that he knew the amounts he had received were taxable because there was so much information about it in the newspapers nowadays. (R. 90.)

At his next meeting with Mr. Thurman, on March 8, 1949, he said he had received promotion payments, but not during 1944, 1945, and 1946. (R. 81.) He said that he had reported \$1,800 from this source in his 1947 income tax return and that he had received \$1,900 therefrom in 1948, which he intended to report on his 1948 return. (R. 154.) Asked what he meant by promotions, he said that that was the money he had received from gamblers and prostitutes. He was then asked about the receipt of money from a madam operating a house of prostitution named Jerry Robin-

son, and he replied he had received some money from her. In response to a question, he then stated that Miss Robinson went out of business in 1946. (R. 81, 82.) He further stated that he received this promotion money in currency, usually \$20 bills. Asked if he kept large sums of money on hand, he said, "No," that he wasn't the kind of person to keep cash in his safe deposit box and that he never had very large sums of currency on hand at any time. (R. 82.) He further stated that he made the large \$6,000 deposit to the Bank of America at Vallejo, California, because he didn't want the local people to know that he had more money coming in than would be accounted for by his salary. (R. 83.)

However, at interview with Mr. Thurman on July 22, 1949, at which his attorney, Harold Simon, and his tax adviser, Hartley Russell, were present, he stated that the source of his income during the years 1944, 1945, and 1946 was his salary as Fire Chief and Police Chief and from gambling (*sic*) and prostitutes, and that he had reported only his salary, and had omitted from his returns his income from other sources, which he estimated at \$2,000 per year. (R. 88.) Appellant said he had deposited in the bank some of the money which he received from prostitutes and gamblers, but not until 1945 and 1946, and that he had used portions of it in liquidating a mortgage on his home in the amount of \$3,758.66 and in making a deposit of \$6,000 at the Bank of America, Vallejo. (R. 89.) He explained his failure to report this income as follows:

“I figured they were just hand-outs, a sort of a gift, I didn’t know I had to pay income taxes on them.” (R. 89.)

He denied that he had omitted it from fear that the local authorities might find out about it. (R. 89.) He stated he avoided depositing the money in the local banks because it wouldn’t look right having more money than his salary. (R. 89.) At the end of the interview, however, Mr. Russell made the statement that Mr. Davena did not report “gratuities for fear of apprehension from local authorities.” (R. 89, 90.)

On October 24, 1949, Mr. Davena stated to Mr. Davis that he would have reported his outside income had he known income tax returns were confidential. (R. 164.)

QUESTIONS PRESENTED IN THIS CASE.

(1) Is the evidence sufficient to support a verdict of guilty on each count of the indictment?

(2) Was there sufficient proof of a *corpus delicti* to warrant admission of the testimony of agents of the Bureau of Internal Revenue concerning statements made to them by the appellant?

ARGUMENT.

I.

THE EVIDENCE SUPPORTS THE VERDICT OF GUILTY AS TO EACH COUNT OF THE INDICTMENT.

A.

Scope of Review on Questions of Insufficiency or Weight of Evidence.

It is a well-established principle that an appellate court will indulge in all reasonable presumptions in support of the ruling of a trial court and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. (2d) 681
(C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, F. (2d)
(C.A. 9th);

Bell v. United States, 185 F. (2d) 302, 308
(C.A. 4th).

The proof in a criminal case need not exclude all possible doubt but “need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt.”

Henderson v. United States, 143 F. (2d) 681
(C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;
Norwitt v. United States, F. (2d)
 (C.A. 9th).

An appellate court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;
United States v. Socony-Vacuum Oil Company,
 310 U.S. 150, 254.

B.

Since the Sentence Imposed, Including the Fine, Did Not Exceed That Which Might Lawfully Have Been Imposed Under Any Single Count, the Judgment Upon the Verdict Must Be Affirmed If the Evidence Sustains the Conviction on Any One Count.

The appellant was sentenced to thirty months imprisonment on each of the three counts of the indictment, the sentences to run concurrently. In addition, the appellant was fined the sum of \$2,500 on the third count.

It has long been the rule that if the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts.

Abrams v. United States, 250 U.S. 616, 619;
Pierce v. United States, 252 U.S. 239, 252-253;

United States v. Trenton Potteries, 273 U.S. 392, 401, 402;
Sinclair v. United States, 279 U.S. 263, 299;
Whitfield v. Ohio, 297 U.S. 431, 438;
Norwitt v. United States, F. (2d)
 (C.A. 9th).

The concurrent sentences of thirty months on each count and the fine of \$2,500 on the third count were within the maximum specified for any one count in 26 U.S.C.A., Section 145(b).

C.

There Was Sufficient Proof of Income Willfully Omitted by the Appellant From His Income Tax Returns.

The Government proved the taxable income of the appellant by the use of the net worth method. The appellant argues that the Government was not entitled to use that method for the reason that it did not establish that the books and records maintained by the appellant were so inadequate that net income could not have been determined therefrom. (Appellant's brief, pp. 28, 29.) No cases are cited by appellant to establish this proposition.

It is not the law that the Government must show the books and records of a defendant to be inadequate in order to use the net worth method of proof of income.

Jelaza v. United States, 179 F. (2d) 202, 204
 (C.A. 4th);
Gariepy v. United States, 189 F. (2d) 459, 461
 (C.A. 6th);

United States v. Hornstein, 176 F. (2d) 217,
220 (C.A. 7th);

Bell v. United States, 185 F. (2d) 302 (C.A.
4th).

In any event, Mr. Thurman, a Government investigator, testified that he was unable to find any records of this income and, further, that the appellant told him that he kept no records of his outside income from gamblers and prostitutes. (R. 83.)

Appellant contends that the testimony of Jerry Robinson was insufficient to establish unreported income in a substantial amount or at all; and further argues that proof of such specific unreported income is a necessary prerequisite of the use of the net worth method of proof of unreported income by the Government in a criminal case. (Appellant's brief, pp. 22-24.) Miss Robinson took the stand to testify that she ran a house of prostitution at Benicia during the years 1944 to 1946, inclusive, and during the time of appellant's tenure as Chief of Police of Benicia. She further testified that she paid moneys over to him at various times in the hope that she would receive favors. Her testimony, together with the admissions of the appellant to the Government agents that he took "promotion" money from gamblers and prostitutes while he was Chief of Police of Benicia, is more than sufficient to establish a source of unreported income as computed by the net worth method. Indeed, the appellant made statements more than once that this was the source and the only source of the income which he did not report. (R. 88, 89, 100.)

In any event, it is not necessary for the Government to introduce proof of specific unreported income or a source thereof as a prerequisite to the use of the net worth method of proof of unreported income.

Jelaza v. United States, 179 F. (2d) 202, 204 (C.A. 4th);

Gariepy v. United States, 189 F. (2d) 459, 463 (C.A. 6th);

United States v. Hornstein, 176 F. (2d) 217, 220 (C.A. 7th);

Schuermann v. United States, 174 F. (2d) 397, 399 (C.A. 8th);

Bell v. United States, 185 F. (2d) 302, 308 (C.A. 4th).

Appellant argues that the Government in arriving at the net worth of the appellant assumed facts which were most detrimental to appellant's position. (Appellant's brief, p. 21.) In this respect, he claims that appellee did not take into account the following items:

(a) The fact that appellant had a net worth of some \$5,300 at the time of his marriage in 1938;

(b) The fact that appellant received a gift of \$5,000 from his mother three or four years prior to the start of the investigation of this case;

(c) The evaluation of an electric train at \$500 instead of \$1,500 on December 31, 1943;

(d) The purchase of a home for \$7,150 in 1946, whereas payment was not made until January 7, 1947;

(e) Computation of tax on the basis of a joint return as filed by appellant and his wife, whereas appellant could have filed a return separate from his wife on the community property basis.

With respect to the contention concerning an alleged net worth of appellant of \$5,300 in 1938, the evidence presented by the Government established that appellant's net worth on December 31, 1943, was \$10,353.68. For the items comprising this total, see hypothetical questions addressed to Augustus V. Brady, Technical Adviser, Bureau of Internal Revenue, and schedule incorporated in statement of facts, *supra*. (R. 187-188.)

As to the claim that appellant received \$5,000 from his mother during one of the years involved, the appellant stated to Mr. Thurman, when he attempted to make inquiry respecting it, that his previous statements with respect to that gift had been a lie and that he "never got anything." (R. 100, 166.) In addition, appellant made the statement under oath on an earlier occasion, that such a gift had been received in the year 1947. (Government's Ex. 8; R. 84-87.)

As to the evaluation of the trains, the Government was entitled to rely on the statement made by the appellant in writing on Government's Exhibit 9. At the time this net worth statement was corrected and signed by the appellant, there was a full discussion relating to the evaluation of the trains, and a letter which was received by the Government at a later date attempting to make a further and incomplete state-

ment as to their evaluation should not be conclusive or binding upon the Government in any way.

With respect to the purchase of a home by the appellant in December of 1946 or the first week of January, 1947, the evidence is that the appellant paid cash in the amount of \$7,150. The time of the purchase was discussed by the appellant and Mr. Thurman at the time Government's Exhibit 9 was corrected and signed, and it was determined that the purchase had been in the year 1946 and that in addition at the end of the year 1946 appellant had cash on hand in the amount of \$3,000. Considering the purchase made, nevertheless, in the first week of January, 1947 and not during the year 1946, it is apparent that the appellant had additional cash on hand in the approximate amount of \$7,150, and the inclusion of this sum in the Government's net worth computations, whether denominated residence or cash on hand, is warranted.

Appellant argues that the computations made by Mr. Brady were based on the fact that appellant filed joint returns during each of the years 1944, 1945, and 1946, whereas if appellant had so desired he could have filed separate returns based upon the community property basis and that if he had done so and had been given credit for the different evaluation of certain assets above discussed, the tax due by appellant for the three years in question would have been \$344.32 on his separate income tax returns and that, therefore, the deficiency in tax would not have been

substantial. He cites, in support of his proposition that a deficiency must be substantial to support a conviction in a tax evasion case, the cases of *Gleckman v. United States*, 80 F. (2d) 394 (C.C.A. 8th), and *Tinkoff v. United States*, 86 F. (2d) 868 (C.C.A. 7th). These cases simply stand for the rule that the Government is not required to prove an evasion of all the tax charged in the indictment and that it is sufficient if any substantial portion of a tax was defeated and evaded. *Tinkoff v. United States*, 86 F. (2d) 868, 878 (C.C.A. 7th), and *Gleckman v. United States*, 80 F. (2d) 394, 399, 400 (C.C.A. 8th) make it clear that so long as there is proof that there was *some* tax due over and above that returned by the taxpayer there is sufficient basis for a conviction under 26 U.S.C., Section 145(b).

With respect to appellant's argument as to the net worth items making up the Government's computation of net worth based upon hypothetical questions addressed to Augustus V. Brady, Technical Adviser of the Penal Division, Bureau of Internal Revenue, it appears that appellant argues that the hypothetical questions assumed facts which were most detrimental to appellant's position.

A hypothetical question is proper where there is evidence tending to prove all of the facts assumed, and it includes all of the material facts which the evidence tends to prove and which bear upon the subject with regard to which the expert is asked to express an opinion. In the case of *Guzik v. United*

States, 54 F. (2d) 618, 619 (C.C.A. 7th), the Court quoted, with approval, from *Jones' Commentaries on Evidence*, Sections 1327 and 1328, as follows:

“Where the facts are in dispute it is sufficient if a hypothetical question fairly states such facts as present the examiner’s theory of the case. It cannot be expected that the interrogatory will include all the contentions or theory of the adversary, since this would require a party to assume the truth of that which he generally denies.
* * * Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly. A question should not be rejected because it does not include all the facts of which there is any evidence at all.
* * * Generally speaking the trial court is the arbiter of the propriety of the question; and the real test of the propriety of any given hypothetical question is its fairness.”

In the case of *United States v. Johnson*, 319 U. S. 503, 519, the Circuit Court had held that admission of testimony of an expert witness regarding Johnson’s income and expenditures during the disputed period invaded the jury’s province. The witness gave computations based on substantially the entire evidence in the record as to Johnson’s income.

“* * * The correctness or credibility of no materials underlying the expert’s answers was even remotely foreclosed by the expert’s testimony or withdrawn from proper independent determination by the jury. The judge’s charge was so clear

and correct that no objection was made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammelled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's, we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules."

See also

Gleckman v. United States, 80 F. (2d) 394, 400 (C.C.A. 8th).

Secondly, appellant was permitted to ask Mr. Brady a hypothetical question based upon the very assumptions that he now complains the Government did not make in its direct examination of Mr. Brady. (R. 203, 206, 221.) Furthermore, when appellant filed joint returns for the years in question under the applicable

law at that time, he made an election to file a joint return and once this election has been made by a taxpayer returns cannot thereafter be filed on any other basis. 26 U.S.C.A., Section 51; and *Morris v. Commissioner of Internal Revenue*, 40 F. (2d) 504 (C.C.A. 2d).

The jury had before it in this case more than ample evidence of unreported income, which consisted of bribes taken by the appellant from gamblers and prostitutes during each of the years 1944, 1945, and 1946. A self-confessed madam of a house of prostitution testified that she bribed the appellant from time to time during these years. The appellant admitted receipt of bribe money, which he called, with significance, "promotion" money, from this madam as well as from other prostitutes and unknown gamblers. His deprecatory estimate was that he received only \$2,000 a year from this source. (R. 88.) The independent testimony of third party witnesses as to his assets, coupled with his corroborating statements to the Government investigators in that respect, shows by positive and convincingly overwhelming evidence that these bribes amounted to thousands of dollars more than \$2,000 a year. Nor did appellant see fit to take the stand and deny the existence of his large increase in net worth over the three year period 1944 to 1946, inclusive. As was said in *Bell v. United States*, 185 F. (2d) 302, 308 (C.A. 4th):

"Bearing this evidence in mind and the complete failure of the defendant to controvert it, and having regard for the rule that evidence must be taken in the light most favorable to the

government in considering its sufficiency, we have no doubt that the submission of the case on the comparison of the taxpayer's net worth at the beginning and end of the tax years was justified, and that the evidence was sufficient to support a verdict of guilty."

Not only was the evidence of a large amount of unreported income more than adequate to support a conviction but the evidence of the appellant's willful intent to evade taxes on the bribes which he accepted was also plain and clear. When first contacted by Mr. Thurman on February 23, 1949, he told him that he had been expecting an investigation ever since about 1947, when the town of Benicia had been "closed up." (R. 75.) Asked by Mr. Thurman if he thought that bribes were taxable, he said "Yes," because there was so much information about it in the newspapers. (R. 90.) Appellant established a bank account in another town—Vallejo—because, he told Mr. Thurman, it wouldn't look right, that he did not want the local people to know that he had more money coming in than would be accounted for by his salary. (R. 83.) It is an obvious inference that he did not want the Bureau of Internal Revenue to know about this income as well.

Appellant made contradictory statements to Special Agent Thurman with respect to an alleged \$5,000 cash gift saying, first, that he received this money in 1946 (R. 807); later, by means of a sworn affidavit, that the money had been received in May of 1947 (Government's Ex. 8); and, finally, "That is a lie. I never got anything." (R. 100.)

During an interview on July 22, 1949, with Mr. Thurman and in the presence of his attorney, Harold Simon, appellant said that he thought the bribes which he had received were simply gifts and that he did not have to pay tax on them, and denied that he had omitted the money from his returns from fear of the local authorities discovering it. Later in the interview, however, he adopted his attorney's statement that the money had been omitted from his returns for fear of apprehension from local authorities. (R. 89, 90.) He later said to Robert W. Davis, Deputy Collector, Bureau of Internal Revenue, that he would have reported the outside income had he known income tax returns were confidential. (R. 164.) It is common knowledge that income tax returns are not open to public inspection or available to the officers of a municipality or state except under certain limited circumstances for the purposes of enforcing state tax laws, and that this has been the law, in substance, since 1913. See Title 26 U.S.C.A., Section 55.

It is not necessary for the Government to adduce direct proof of willful intent. It may be inferred from the acts of the parties that such inferences may arise from a combination of acts.

United States v. Rosenblum, 176 F. (2d) 321, 329 (C.A. 7th);

Battjes v. United States, 172 F. (2d) 1, 5 (C.A. 6th);

Norwitt v. United States, F. (2d) (C.A. 9th).

If a man intentionally handles his income so as to avoid making an accurate record of it and then files returns which to his knowledge substantially understate his income, and the tax evasion motive played any part in his conduct, the offense of income tax evasion is made out even though the conduct may also have served other purposes, such as concealment of another crime. *Spies v. United States*, 317 U.S. 492, 499; *United States v. Wexler*, 79 F. (2d) 526 (C.C.A. 2d).

There is sufficient evidence in which the jury could have found that the appellant received unreported income in the nature of bribes from prostitutes and gamblers during each of the years 1944, 1945, and 1946; that he knew he had received this income, that it was income, and that it should have been reported on his income tax returns; that he knew it was not reported on his income tax returns, and that he had as a motive for omitting this income from his returns the evasion of income tax which he knew was lawfully due to the Government of the United States.

D.

There Was Sufficient Proof of a Corpus Delicti to Warrant Admission Into Evidence of the Extrajudicial Statements of the Appellant Made to Agents of the Bureau of Internal Revenue.

The appellant argues, by dint of quotation from the case of *United States v. Fenwick*, 177 F. (2d) 488 (C.A. 7th), that the Government failed to prove a *corpus delicti* sufficiently to admit the extrajudicial statements of the appellant which were made orally

and in writing to Mr. Thurman and Mr. Davis, agents of the Bureau of Internal Revenue. In connection with this contention, it is respectfully submitted that the case of *Bell v. United States*, 185 F. (2d) 302 (C.A. 4th), answers and rejects contentions virtually identical with those made by the appellant in this case and that the *Bell* case, 185 F. (2d) 302 (C.A. 4th), presents a factual situation remarkably similar to that disclosed by the record in this case. The reasoning of the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th), which was decided by the United States Court of Appeals, Seventh Circuit, on November 4, 1949, has been consistently denied or distinguished in the *Bell* case, 185 F. (2d) 302 (C.A. 4th), and in other subsequent net worth and expenditure cases.

Brodella v. United States, 184 F. (2d) 823, 825 (C.A. 6th);

Gariepy v. United States, 189 F. (2d) 459, 462 (C.A. 6th).

The *Gariepy* case, 189 F. (2d) 459, 462 (C.A. 6th), made the following reference to the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th):

“The appellant’s reliance upon *Bryan v. United States*, 5 Cir., 175 F. 2d 223 and *United States v. Fenwick*, 7 Cir., 177 F. 2d 488 is of little avail to him because there was no such comprehensive investigation either as to the net assets at the base period or subsequent increases as was here undertaken. Moreover, in the *Bryan* case, a vigorous dissent weakens the conclusion there arrived at, and the *Fenwick* case appears to be in conflict with *United States v. Hornstein*, 7 Cir.,

176 F. 2d 217, decided by the Seventh Circuit but a few months prior to *Fenwick*. Judge Miller of this court, writing in *Brodella v. United States*, 6 Cir., 184 F. 2d 823, had no difficulty in distinguishing the Bryan and Fenwick cases from cases involving facts similar to those here produced.

“The defensive strategy of the appellant was to remain silent and challenge the government to prove its case. This, of course, he had a right to do but he now urges, upon appeal, that the government had an obligation to establish beyond reasonable doubt that there were no resources other than current taxable income with which to make the substantial expenditures of the prosecution years. * * * The argument borders on the fantastic * * *”

This Honorable Court had occasion to consider the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th), in connection with the decision of *Gendelman v. United States*, 191 F. (2d) 993, 996, certiorari denied, U.S. Gendelman argued at some length before this court that the judgment should be reversed on the basis of the *Fenwick* case, 177 F. (2d) 488 (C.A. 7th). (Appellant's opening brief, pp. 27-30, 33, 34.) However, the decision reaffirmed the position that this court took in the case of *Barcott v. United States*, 169 F. (2d) 929 (C.C.A. 9th).

The *Fenwick* case, 177 F. (2d) 488, 489, 490 (C.A. 7th), uses the following language:

“* * * the conviction cannot stand unless there is proof of the corpus delicti, existence of which

cannot be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. * * * In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. *Gleckman v. United States*, 8 Cir., 80 F. 2d 394, 399; *United States v. Miro*, 2 Cir., 60 F. 2d 58, 61; *O'Brien v. United States*, 7 Cir., 51 F. 2d 193, 196. *Inasmuch as there is no direct proof that defendant received income which he did not report*, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt." [Italics supplied.]

It is submitted that the above proposition of law is not supported by the authorities cited and should not be followed by this court. As was stated by the court in the case of *Bell v. United States*, 185 F. (2d) 302, 309 (C.A. 4th):

"The defendant relies principally upon *Bryan v. U. S.*, 5 Cir., 175 F. 2d 223, and *U. S. v. Fenwick*, 7 Cir., 177 F. 2d 488, in both of which it was held that evidence based on the net worth theory was insufficient to support a conviction

of attempting fraudulently to evade the income tax, since the government's case did not exclude the reasonable possibility that the defendant had other assets at the beginning of the period than those shown by the government's statement; and the court directed a verdict saying that the evidence, being circumstantial, must exclude every reasonable hypothesis except that of the defendant's guilt. But we cannot follow these decisions since it is obvious that they are based upon their particular facts and they do not relieve us from the duty of appraising the sufficiency of the evidence in the case before us. *That responsibility does not include a finding as to whether the defendant is guilty beyond a reasonable doubt.*" [Italics supplied.]

The *Fenwick* case, 177 F. (2d) 488 (C.A. 7th), in holding that the Government must establish proof of specific unreported income as a prerequisite to the use of a net worth method of proof of unreported income or, in the alternative, to prove a negative or to refute all possible speculation as to the source of appellant's funds asserted by the Government to prove appellant's net worth, departs from a well established line of authority both prior and subsequent to the decision in that case.

Gariepy v. United States, 189 F. (2d) 459, 463 (C.A. 6th);

Bell v. United States, 185 F. (2d) 302, 308 (C.A. 4th);

Jelaza v. United States, 179 F. (2d) 202, 204 (C.A. 4th);

United States v. Hornstein, 176 F. (2d) 217,
220 (C.A. 7th);
Schuermann v. United States, 174 F. (2d) 397,
399 (C.A. 8th).

The best exposition of the applicable rules surrounding the admission of a defendant's extrajudicial statements and the requirements of proof of *corpus delicti* where the net worth method of proof is used may be found in the case of *Bell v. United States*, 185 F. (2d) 302, 309 (C.A. 4th):

“The defendant, pointing out that the government's case against him consists of the net worth statements and his own admissions, contends that the case must fall on the ground that the net worth statements are insufficient in themselves to prove his guilt and that in the absence of proof of the corpus delicti, a conviction of crime may not be based solely on the confessions or admissions of the defendant. This argument assumes that the net worth statements in themselves furnish no substantial evidence whatsoever of the corpus delicti in this case; but is not true, as we have seen. Moreover, the rule does not require that the corpus delicti be completely shown by evidence aliunde defendant's confessions, but admits the confessions where other substantial evidence of the crime is shown, and thereupon both the statements of the defendant and the independent evidence must be taken into consideration by the jury in determining whether guilt is proven beyond a reasonable doubt. In *Daeche v. U. S.*, 2 Cir., 250 F. 566, 571, cited with approval in *Warszower v. U. S.*, 312 U. S. 342, 345, 61 S. Ct. 603, 85 L. Ed. 876, it was said: “* * * The corrob-

oration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. * * * But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof.' See also, *Yost v. U.S.* 4 Cir., 157 F. 2d 147, 150; *Forte v. U. S.*, 68 App. D.C. 111, 94 F. 2d 236.

"In this case there is substantial evidence outside of Bell's statements to indicate his guilt. It consists of the increase in his net worth during the taxable years, the absence of personal records or books of account, and the inadequacy of the corporate records to show fully either its transactions or those of the defendant; and this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through his employees either during the agent's investigation or the trial in court. It is true that the burden of proof resting upon the government does not shift during the progress of a criminal case but when in the trial of charges of income tax evasion discrepancies between the taxpayer's re-

turns and his actual income are *indicated* by the government's proof, the failure of the defendant to offer explanation in any form may be considered by the jury in finding its verdict. In *Rossi v. U. S.*, 289 U. S. 89, 91, 53 S. Ct. 532, 533, 77 L. Ed. 1051, the court said: 'The general principle, and we think the correct one, underlying the foregoing decisions, is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.' See also, *Jelaza v. U. S.*, 4 Cir., 179 F. (2d) 202; *U. S. v. Hornstein*, 7 Cir., 176 F. (2d) 217, 220; *Bradford v. U. S.*, 5 Cir., 130 F. (2d) 630." [Italics supplied.]

Furthermore, it is the contention of the Government that the prerequisite proof of *corpus delicti* as set out even in the *Fenwick* case, 177 F. (2d) 488, 490 (C.A. 7th), exists in the record. In this connection, it should be noted that the Government *did* produce "direct proof that the defendant received income which he did not report" through the testimony of Jerry Robinson. (R. 33, 36.) In addition, it is submitted that the net worth of William R. Davena, Jr., was established by evidence independent of any admissions which he made to the Government agents, as shown by the following schedule:

**NET WORTH OF WILLIAM R. DAVENA, JR., AS ESTABLISHED BY
EVIDENCE INDEPENDENT OF HIS ADMISSIONS**

Item	Dec. 31			Record		Witness
	1943	1944	1945	1946	Pages	
1. Savings account, Benicia	\$ 504.08	\$ 920.39	\$ 989.61	\$ 1,090.05	37-39	Frank Bernardo
2. " " Vallejo				6,000.00	41	Robert E. Arvedi
3. Commercial account, Benicia	635.60	791.30	1,061.60	847.42	39	Frank Bernardo
4. House, 127 "J" St., equity	789.00	969.00	4,913.00	4,913.00	(39, 40 (42, 43 (45-47	Frank Bernardo) Gary Rees) Leonora F. Silveira)
5. Russold improvements			750.00	1,150.00	48, 49	Mrs. Mary Russold
6. War Bonds	75.00	168.75	243.75	243.75	77, 78	Donald J. Thurman
7. House, 125 "J" St.*				7,150.00	51, 52	Genevieve Bennett
8. Automobiles		2,172.91	2,172.91	2,671.53	(56 (59, 60, 61	E. R. Trethway) Frank Coronado)
9. Liabilities	0	0	0	0	(156 (166	Donald J. Thurman) Robert W. Davis)
Totals	\$2,003.68	\$5,022.35	\$10,130.87	\$24,065.75		
Increase in Net Worth		\$3,018.67	\$ 5,108.52	\$13,934.88		
10. Withholding taxes paid		285.60	270.00	188.80	32	John H. Reedy
11. Refunds received		(52.51)	(22.63)	(16.24)	32	John H. Reedy
Totals	\$3,251.76	\$ 5,355.89	\$ 5,355.89	\$14,107.44		
Adjusted Gross Income per Returns	3,475.00	3,475.00	3,560.00	3,620.00	Exs. 2, 3, 4	John H. Reedy
Difference	(\$223.24)	\$ 1,795.89	\$ 1,795.89	\$10,487.44		

*Or cash on hand.

It may be argued by the appellant that the above schedule discloses a deficiency in proof of unreported income for the year 1944, but it should be noted that living expenses of the appellant are in no wise taken into account, and it is a matter of common knowledge that appellant could not have lived on \$223.24 for the entire year 1944. In any event, such proof is sufficient as to the years 1945 and 1946 and, as heretofore argued, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict must be affirmed if the evidence sustains the conviction on any one count. See cases cited *supra*, at pages 17-18.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment and sentence of the Court should be affirmed.

Dated, San Francisco, California,
April 18, 1952.

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No. 13,131

United States Court of Appeals
For the Ninth Circuit

WILLIAM R. DAVENA, JR.,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

(Or, If Such Rehearing Be Denied, For a Stay of Mandate.)

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FILED

JUL 2 1952

PAUL P. O'BRIEN

CLERK

No. 13,131

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*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

William R. Davena, Jr., appellant above named, hereby petitions for a rehearing of the above cause decided on June 27, 1952, for the following reasons, to wit:

(1) There was no evidence presented by the appellee that substantially indicated or tended to prove that the appellant received any substantial income in the years in question, to wit, 1944, 1945 and 1946, which he did not include in his return.

(2) This Court has not taken into consideration the fact that the only income which was not reported

by the appellant was some \$50.00 given to him at Christmas time by a Mrs. Robinson, and as a matter of fact, Mrs. Robinson testified that she really did not know when or how much she ever gave to the appellant.

The only evidence in this case from which the Court may draw an inference of guilt was the appellant's own statement which was made after extended questioning by the agents of the United States Government and given in such circumstances that indicated to the appellant that if he made such statement the case could be civilly compromised.

CONCLUSION.

In conclusion it is submitted that the evidence was insufficient to support the conviction. It is based on mere assumptions drawn by the Government's witnesses from inadequate facts. The record is in such a condition that no witness could state with any degree of certainty when and from what source the appellant received any taxable income.

Dated, Sacramento, California,
July 25, 1952.

EMMET J. SEAWELL,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Sacramento, California,
July 25, 1952.

EMMET J. SEAWELL,
*Attorney for Appellant
and Petitioner.*

